93-722

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DETREX CORPORATION,
Petitioner,

v.

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the bulk delivery of useful hazardous substances by Petitioner in tanker trucks to Respondents' manufacturing plant falls within the scope of the exception to the definition of "facility" which excludes consumer products in consumer use or in vessels found in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601 through 9675?

2. Is a cost recovery lawsuit by a potentially responsible party against other liable parties under 42 U.S.C.A. § 9607(a) of the Comprehensive Environmental Response, Compensation and Liability Act an action for contribution requiring district courts to equitably apportion responsibility among the litigants after strict and joint and several liability is imposed?

THE PARTIES

Petitioner is Detrex Corporation the only remaining Defendant before the District Court for the Northern District of Indiana and the Appellant before the United States Court of Appeals for the Seventh Circuit. Detrex is a Michigan corporation. Respondents Amcast Industrial Corporation and Elkhart Products Corporation were Plaintiffs before the District Court and Appellees before the United States Court of Appeals for the Seventh Circuit. Amcast Industrial Corporation, an Ohio corporation, is the parent of Elkhart Products Corporation, an Indiana corporation.

With respect to non-wholly owned subsidiaries, Detrex Corporation owns 100% of The Elco Corporation, an Ohio corporation, which in turn owns 85% of Harvel Plastics, Inc., a Pennsylvania corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
THE PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS	1
JURISDICTIONAL STATEMENT	2
THE STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
INTRODUCTION	2
1. Respondents Own and Operate a Manufacturing Facility Which is Extensively Contaminated With Hazardous Substances	3
2. Procedural History of the Case and Jurisdictional Statement	5
3. CERCLA Contains a Variety of Liability Exceptions	7
REASONS FOR GRANTING THE PETITION	10
I. DETREX IS NOT LIABLE UNDER CERCLA BECAUSE ITS TRUCKS WERE NOT FACILITIES	11
A. The Definitional Exception Refers to Facilities That Contain Consumer Products	11
B. The Interpretation of § 9601(9) Presents an Important Question of Federal Law	17
C. There is a Split of Authority Among the Circuits Concerning the Scope of the Exception	18

TABLE OF CONTENTS—Continued

Page

D. The Court has the Opportunity to State a Complete and Understandable Rule of Law.. 21

II. CERCLA LAWSUITS BETWEEN PARTIES UNDER § 9607(a) ARE ACTIONS FOR CONTRIBUTION REQUIRING AN EQUITABLE ALLOCATION 21

A. Detrex was Entitled to an Equitable Allocation After the Imposition of Joint and Several Liability 21

B. This Petition for a Writ of Certiorari Should be Granted Because There is a Split of Authority on This Issue 25

C. This Issue Presents an Important Question of the Proper Interpretation of a Federal Environmental Statute 26

D. This Issue Should be Resolved with an Uncomplicated Rule of Law 28

CONCLUSION 29

APPENDIX 1a-84a

TABLE OF AUTHORITIES

CASES: Page

Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989) 22, 23, 26
Ardestani v. INS, —— U.S. ——, 116 L. Ed. 2d 496, 112 S. Ct. 515 (1991) 13
Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132 (D.R.I. 1992) 24
County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991) 24, 25
CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432 (D.N.H. 1991) 20
Davis v. Michigan Dept. of Treas., 489 U.S. 803, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989) 15
Dayton Indep. Sch. Dist. v. United States Mineral Prods., Co., 906 F.2d 1059 (5th Cir. 1990) 12, 18, 19, 20
Demarest v. Manspeaker, 498 U.S. 184, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991) 13
Electric Power Bd. of Chattanooga v. Westinghouse Electric Corp., 716 F. Supp. 1069 (E.D. Tenn. 1988) 20
First United Methodist Church v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070, 107 L. Ed. 2d 1020, 110 S. Ct. 1113 (1990) 8
Freytag v. Commissioner of Int. Rev., —— U.S. ——, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991) 13
Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 76 L. Ed. 704, 52 S. Ct. 322 (1931) 13
Howe v. Smith, 452 U.S. 473, 69 L. Ed. 2d 171, 101 S. Ct. 2468 (1981) 13
In re Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991) 23, 26
Reading Co. v. City of Philadelphia, 823 F. Supp. 1218 (E.D. Pa. 1993) 20
United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992) 11, 23, 26
United States v. Asarco, Inc., 814 F. Supp. 951 (D. Colo. 1993) 23

TABLE OF AUTHORITIES—Continued

	Page
United States v. Constantine, 296 U.S. 287, 80 L. Ed. 233, 56 S. Ct. 223 (1935)	20
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)	13
Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142 (D. Conn. 1990)	20
Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 37 L. Ed. 2d 207, 93 S. Ct. 2469 (1973)	13, 14
Weyerhaeuser Co. v. Koppers Co., 771 F. Supp. 1420 (D. Md. 1991)	23
Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989)	8
STATUTES:	
28 U.S.C.A. § 1254(1)	2
28 U.S.C.A. § 1331	5
28 U.S.C.A. § 2201	5
42 U.S.C.A. §§ 9601 through 9675	2
42 U.S.C.A. § 9601(9)	*passim*
42 U.S.C.A. § 9601(14)	8
42 U.S.C.A. § 9601(20)(B)	9, 16
42 U.S.C.A. § 9601(20)(C)	9, 16
42 U.S.C.A. § 9601(22)	9
42 U.S.C.A. § 9607	18
42 U.S.C.A. § 9607(a)	*passim*
42 U.S.C.A. § 9607(a)(1)	5, 6, 12
42 U.S.C.A. § 9607(a)(3)	5, 6
42 U.S.C.A. § 9607(b)	7
42 U.S.C.A. § 9613(b)	5
42 U.S.C.A. § 9613(f)	10, 23, 24, 25
42 U.S.C.A. § 9613(f)(1)	*passim*
42 U.S.C.A. § 9613(f)(2)	27, 28
42 U.S.C.A. § 9613(f)(3)(B)	24
42 U.S.C.A. § 9656	9, 15
42 U.S.C.A. § 9656(a)	16
42 U.S.C.A. § 9656(b)	9, 15
49 U.S.C.A. §§ 1801, *et seq.*	9, 15, 16
49 U.S.C.A. App. § 1801	17

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

	Page
126 CONG. REC. S30949 (daily ed. Nov. 24, 1980)	16
CHEMICAL MANUFACTURERS ASSOCIATION, U. S. CHEMICAL INDUSTRY STATISTICAL HANDBOOK (1993)	17, 18
H.R. REP. No. 99-253(I), 99th Cong., 2d Sess. 59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2861	22
Russo, *Contribution Under CERCLA: Judicial Treatment after SARA*, 14 COLUM. J. ENVTL. L. 267 (1989)	22

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OPINIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

The District Court issued two Memoranda and Orders granting the summary judgment motions of Amcast Industrial Corporation and Elkhart Products Corporation ("Respondents"). The initial decision of the District Court is reported at 779 F. Supp. 1519 (N.D. Ind. 1991) and, for the convenience of the Court, is set out in the Appendix at 33a through 81a. Also, the District Court's second Memorandum and Order is reported at 822 F. Supp. 545 (N.D. Ind. 1992) and is at 11a through 32a of the Appendix.

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on August 12, 1993, is at 1a through 10a of the Appendix. On appeal, the decisions

of the District Court were affirmed in part, reversed in part, and the case was remanded for further proceedings.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was also entered on August 12, 1993. Petitioner Detrex Corporation ("Detrex") timely filed a Motion to Stay Issuance of the Mandate with the United States Court of Appeals for the Seventh Circuit. Significantly, the motion was granted and issuance of the mandate was stayed until November 12, 1993. The Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") by writ of certiorari pursuant to 28 U.S.C.A. § 1254(1).

THE STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation of several provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601 through 9675, as amended. The CERCLA sections at issue, § 9601(9), § 9607(a), and § 9613(f)(1), are set out at 82a through 84a of the Appendix for the convenience of the Court.

STATEMENT OF THE CASE

INTRODUCTION

This lawsuit concerns Detrex's delivery of an industrial solvent, trichloroethylene ("TCE"), to Respondents' manufacturing facility located in Elkhart, Indiana. TCE was occasionally spilled in small amounts during some of the deliveries. Respondents filed suit to recover response costs expended in cleaning up all of the soil and groundwater at its manufacturing facility and included in their complaint two counts under CERCLA. Detrex is not a proper defendant under CERCLA because the statutory definition of facility cannot be met. TCE was a "consumer product

in consumer use or any vessel." Because Detrex was not the owner or operator of a facility from which there was a release of hazardous waste, it could not be liable under CERCLA. Respondents, however, may have had recourse under other common law or statutory theories. At the very least, Detrex was entitled to an equitable allocation of the liability of the parties.

1. ***Respondents Own and Operate a Manufacturing Facility Which is Extensively Contaminated With Hazardous Substances.***

The Respondents own and operate a large manufacturing plant in Elkhart, Indiana which is the subject matter of this lawsuit. Since at least the early 1950s, Respondents have manufactured copper fittings from copper pipe at the facility. The soil and groundwater at the facility are contaminated with hazardous substances, including TCE and 1-1-1 trichloroethane ("TCA"). TCE and TCA have been widely used by industries as solvents for decades. The chemicals are used to remove lubricants applied during manufacturing because they are effective cleaning agents.

The manufacturing process of the Respondents required the extensive use of degreasing solvents including TCE and TCA. During the manufacturing process, copper fittings were covered with heavy oil for lubrication. The heavy oil was removed from the copper fittings with TCE and TCA in a machine called a degreaser. Respondents had two large degreasers within the manufacturing facility. TCE was piped into the degreasers within the plant from two above-ground storage tanks which were located just outside the building.

For years the Respondents repeatedly purchased, used, and disposed of thousands of gallons of TCE which were delivered into the two above-ground storage tanks. There were several suppliers of TCE and TCA to Respondents including Inland Chemical, Van Waters & Rogers, and

Hoosier Solvents. Detrex supplied only TCE to Respondents and did not regularly supply that chemical until 1978. Deliveries of TCE to Respondents were made by both Detrex and Transport Service Company ("Transport"), an independent common carrier hired by Detrex.

Between 1978 and 1986, Detrex sold TCE to Respondents on approximately 34 occasions. Detrex made 19 deliveries of TCE and Transport made 15. Detrex's truck drivers received training in delivery techniques and were careful to avoid spilling during deliveries. Nevertheless, this case concerns alleged delivery spills of TCE by both Transport and Detrex drivers. As the Seventh Circuit succinctly phrased the point "[t]here is evidence that both Detrex's and Transport Services' [sic] drivers sometimes spilled TCE accidentally on" the manufacturing facility. Appendix at 2a.

Respondents are responsible for the vast majority of TCE and all of the TCA contamination at the manufacturing facility. The Seventh Circuit concluded that "Elkhart is admittedly a 'responsible person,' as an entity liable for response costs" under CERCLA. Appendix at 3a. Respondents were reckless with TCE because they did not consider it environmentally hazardous. TCE dripped onto the plant floor during the manufacturing process. Virgin TCE was used for cleaning tools at the facility. TCE was used by Respondents to scrub floors within the plant. Black TCE sludge was produced by Respondents as a waste product of their manufacturing process and was stored in drums at several locations at the facility. TCE sludge leaked out of the drums. Rainwater got into the uncovered storage drums and forced TCE sludge out over the top.

TCE contamination was first detected in groundwater beneath Miles, Inc., a neighboring landowner, in June of 1984. The environmental report prepared on behalf of Miles, Inc. concluded that the source of the TCE pollution was Respondents' manufacturing facility. Respondents

hired their own environmental consultant who concluded that the soil and groundwater at the manufacturing facility were contaminated with TCE and related organic chemicals.

Detrex hired a groundwater hydrogeologist to assess its potential liability who calculated that the maximum amount of TCE which Detrex could have spilled on delivery was 49 gallons out of almost 800 total gallons in the soil and groundwater. He also concluded that spilled TCE evaporated and could not have impacted the environment. Several other activities of the Respondents were identified by the hydrogeologist as probably causing contamination including: a TCE sludge storage area, a waste disposal pit, a waste water treatment plant, underground piping from the tanks into the degreasers, and use of TCE to clean plant floors and tools.

2. *Procedural History of the Case and Jurisdictional Statement.*

Respondents commenced this lawsuit with the filing of a 13 count complaint on October 13, 1988. This lawsuit was properly initiated in the United States District Court for the Northern District of Indiana. The District Court possessed jurisdiction over this lawsuit pursuant to 28 U.S.C.A. § 1331, the federal question statute, and 28 U.S.C.A. § 2201, the declaratory judgment act. Section 9613(b) states that district courts enjoy exclusive jurisdiction over all CERCLA controversies. The counts within the complaint included negligence, breach of contract, trespass, abnormally dangerous activity, and others. The core of the complaint, however, was two CERCLA counts. Count I claimed that Detrex was a potentially responsible party under § 9607(a)(1) of CERCLA as an owner and operator of a facility. Additionally, Count II alleged that under § 9607(a)(3) of CERCLA, Detrex was liable as an arranger for disposal of hazardous substances at the manufacturing facility. Respondents assert

that Detrex is liable under CERCLA because it spilled TCE during deliveries.

This lawsuit was decided in the District Court based upon two summary judgment motions filed by Respondents and one submitted by Detrex. After discovery concluded, Respondents sought summary judgment against Detrex under § 9607(a)(1) of CERCLA. Detrex's summary judgment motion requested dismissal of all counts within Respondents' complaint. These initial motions were resolved by the District Court in a Memorandum and Order dated November 18, 1991. Appendix at 33a through 81a. Detrex, according to the District Court, was liable under § 9607(a)(1) of CERCLA as an owner and operator of a facility. The only bases for concluding that Detrex was a liable party under CERCLA were alleged small delivery spills and an open valve spill. Appendix at 59a and 69a. With respect to Respondents' claim under § 9607(a)(3), Detrex argued that the sale of virgin TCE, a useful manufacturing chemical and not a waste product, was not an arrangement for disposal giving rise to CERCLA liability.

In the second Memorandum and Order, dated April 9, 1992, Appendix at 11a through 32a, the District Court concluded that Detrex was also liable under § 9607(a)(3) of CERCLA. *See* Appendix at 15a. Detrex was held severally liable for all of the Respondents' past and future response costs then totalling $1,197,082.42. A judgment was issued that same day by the District Court against Detrex.

The Seventh Circuit's opinion is dated August 12, 1993. Detrex argued to the Seventh Circuit that it was not liable under § 9607(a)(1) of CERCLA because the definition of facility excludes "any consumer product in consumer use or any vessel." 42 U.S.C.A. § 9601(9). The Seventh Circuit disagreed concluding that "[t]he exception is for facilities that *are* consumer products in consumer use, not

for consumer products contained in facilities." Appendix at 8a.

With respect to the second issue on appeal here, Detrex argued that it was entitled to an equitable allocation of liability. Respondents' action under § 9607(a) of CERCLA is a claim for contribution because they too are liable under the statute. Private CERCLA lawsuits between parties under § 9607(a) are contribution actions and the District Court should have determined the respective liability percentages of Detrex and Respondents after imposing strict and joint and several liability. The Seventh Circuit rejected Detrex's apportionment argument. Judge Posner concluded that a defendant in a CERCLA lawsuit can counterclaim in the initial action and obtain an allocation of liability percentages or file a second action. According to the Seventh Circuit, absent such a counterclaim, an equitable allocation is not appropriate in a § 9607(a) CERCLA action. Thus, if a CERCLA defendant does not file a counterclaim in a § 9607(a) lawsuit, it will not receive a liability apportionment.

The judgment of the Seventh Circuit was also issued on August 12, 1993, affirming in part, reversing in part, and remanding the case to the District Court. Detrex timely moved for an order to stay issuance of the mandate by the Seventh Circuit. On September 3, 1993, Judge Posner granted Detrex's motion staying issuance of the mandate until November 12, 1993. By granting Detrex's motion, the Seventh Circuit recognized the significance of the issues presented by this case.

3. *CERCLA Contains a Variety of Liability Exceptions.*

CERCLA imposes *strict* liability upon parties. Liability under CERCLA, however, is not *absolute*. The statute contains sundry exceptions or exclusions from liability. The most obvious or common of these are the four defenses expressly stated in § 9607(b). Liability under

CERCLA does not exist if the contamination was caused solely by:

1. an act of God;
2. an act of war;
3. an act or omission of a completely unrelated third party; and
4. any combination of the above.

In addition, there are several other liability exclusions which are much broader in their application. These exclusions negate one or more of the requisite elements necessary to establish CERCLA liability, thereby, preventing recovery under the statute. The phrase "hazardous substance" is very broadly defined under CERCLA. 42 U.S.C.A. § 9601(14). Yet, Congress carved out a huge exception for petroleum and related products. In *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989), it was held "that the petroleum exclusion in CERCLA does apply to unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA." Benzene is a constituent of petroleum and is known to cause cancer.

CERCLA does not apply to removal actions involving asbestos which also causes cancer. In *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070, 107 L. Ed. 2d 1020, 110 S. Ct. 1113 (1990), the Court refused to expand CERCLA to cover asbestos abatements. It held that "it is made clear that § 9604(a)(3)(B) represents much more than a procedural limitation on the President's authority; instead, it is a substantive limitation of the breadth of CERCLA itself." *First United*, 882 F.2d at 868.

Congress was concerned with how CERCLA would impact transporters of useful hazardous subtances. Accord-

ingly, there are at least two provisions within CERCLA which negate liability with respect to the transportation of useful hazardous substances. Sections 9656 and 9601 (20)(B) and (C), have not been judicially construed. Section 9656(b) provides that common or contract carriers are not liable under CERCLA but may be liable under other law for damages stemming from the release of hazardous substances during the course of transportation. There are other statutory laws which could have application to spills during transportation. For example, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C.A. §§ 1801, *et seq.*, is intended to "protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C.A. § 1801. Common law theories, of course, may also have application. Shippers are excluded from liability in certain circumstances under § 9601(20)(B). Also, § 9601(20)(C) exempts a common or contract carrier from CERCLA liability where the release was caused by circumstances or conditions beyond its control.

The definition of release found at § 9601(22) also contains exclusions. Workplace releases, combustion engine emissions, and certain releases of nuclear material are CERCLA exempt.

Unquestionably, while the statute imposes liability without regard to fault, Congress did not intend for CERCLA to apply to every release of a useful hazardous substance. The many exceptions to liability within the statute make this clear. Statutes which impose strict liability necessarily limit the scope of their application. This case focuses upon the exception inserted by Congress into the definition of facility.

REASONS FOR GRANTING THE PETITION

Detrex would raise two arguments on appeal. The first issue is whether Detrex's deliveries of TCE to Respondents' above-ground storage tanks are exempted from CERCLA liability by virtue of the "consumer product in consumer use or in any vessel" exception to the definition of facility. Detrex believes that the Seventh Circuit incorrectly interpreted § 9601(9) of CERCLA. Certiorari should be granted on this issue because: 1) the interpretation of § 9601(9) presents an important federal question of concern to all chemical manufacturers and suppliers and to all transporters of useful hazardous substances; and 2) there is a split of authority concerning the proper interpretation of this exception. The Court should fashion a clear rule of law on how this provision of CERCLA should be interpreted and applied because of the sheer volume of useful hazardous substances delivered every day by truck, rail, and ship in the United States.

The second issue raised by Detrex is whether a CERCLA defendant is entitled to an equitable allocation in a § 9607(a) action without a formal count invoking § 9613(f). The Seventh Circuit has imposed a technical requirement upon CERCLA defendants by holding that a formal counterclaim or a second lawsuit is necessary before such an allocation can be made. Detrex asserts that this conclusion, too, is erroneous. Certiorari should be allowed on this issue because the decision of the Seventh Circuit directly conflicts with three other circuit court decisions. *See infra* Section II. The issue also presents an important question of federal law concerning the proper allocation of response costs among those persons responsible for contamination. The issue is a straightforward one and, therefore, its resolution need not be complex.

On the eve of the reauthorization of CERCLA in 1994, Detrex requests that the Court provide guidance concern-

ing these two important and recurring CERCLA issues. Answering these questions now will likely help promote cleanup efficiency. If these issues do not have to be litigated in the future, the attention of the parties may focus upon remediation and not litigation. Certainly, the goal of more and prompt cleanups is worth pursuing.

I. DETREX IS NOT LIABLE UNDER CERCLA BECAUSE ITS TRUCKS WERE NOT FACILTIES.

A. The Definitional Exception Refers to Facilities That Contain Consumer Products.

CERCLA authorizes private parties to recover response costs expended in cleaning up environmental contamination. Before such a recovery can be obtained, the defendant must be determined a liable party under CERCLA. To establish CERCLA liability, a plaintiff must satisfy four elements:

1. the defendant must fall within one of the four categories of liable parties under § 9607(a);
2. the hazardous substances must be released from a facility or come to be located at a facility;
3. there must be a release or threatened release of hazardous substances from a facility into the environment; and
4. the release must cause the incurrence of response costs consistent with the National Contingency Plan.

See United States v. Alcan Aluminum Corp., 964 F.2d 252, 258-259 (3d Cir. 1992) and the decision of the District Court, Appendix at 57a. If any element is not satisfied, CERCLA liability does not attach. If liability is not imposed under CERCLA, the plaintiff is not entitled to recover response costs.

Detrex argues that Respondents are not entitled to recover response costs from it because the second element

cannot be met *i.e.*, the Detrex trucks which delivered the TCE were not facilities by definition. When the TCE was being delivered by Detrex's truck drivers, the vehicles were not facilities because the TCE contained in them was a consumer product in consumer use or in a vessel. When the TCE was spilled onto Respondents' property, it was in their facility and Detrex was no longer responsible for it under CERCLA. In short, Detrex argues that it was not an owner or operator of a facility under CERCLA § 9607(a)(1). Judge Posner succinctly summarized Detrex's argument at 7a-8a in the Appendix.

This issue concerns the proper interpretation of the definition of facility in § 9601(9) of CERCLA. The first provision of the definition lists various physical objects, including pipes, storage containers, and motor vehicles, which contain or store hazardous substances. The second portion of the definition is a catchall phrase intended to include any site or area where a hazardous substance exists. Congress chose to include within this definition an exception so that the term facility does not include "any consumer product in consumer use or any vessel."

The analysis of the Seventh Circuit addresses this issue in terms of whether the language of the exception should be read literally or not. Judge Posner, while not agreeing with the end result of Detrex's analysis, concurred with some of the underlying reasoning. The Seventh Circuit concluded that the TCE was a consumer product by concurring with the decision in *Dayton Indep. Sch. Dist. v. United States Mineral Prods., Co.*, 906 F.2d 1059 (5th Cir. 1990). Appendix at 6a-7a. Consequently, the TCE at issue here was a consumer product. The Seventh Circuit went on to hold that only consumer products that are themselves facilities are exempted from liability. Under the interpretation advanced by Detrex, the liability exclusion refers to facilities that contain or store hazardous substances like tanker trucks. The Seventh Circuit held that "[t]he exception is for facilities that *are* consumer

products in consumer use, not for consumer products contained in facilities. Although read as it is written the exception is narrow, it is not meaningless, for the statute defines 'facility' so broadly that it could be thought to include a can of lye." Appendix at 8a. The decision of the Seventh Circuit is not correct because Judge Posner failed to consider the last three words of the exception.

This Court has pronounced several rules concerning statutory interpretation which have application here. Interpretation of statutes must begin with the language of the law itself. *Ardestani v. INS*, —— U.S. ——, 116 L. Ed. 2d 496, 112 S. Ct. 515 (1991). The Court will not look to extraneous sources to aid in the interpretation of an unambiguous statute. *Freytag v. Commissioner of Int. Rev.*, —— U.S. ——, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991). "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991) (citations omitted). Thus, judicial inquiry is not necessary when the statutory language at issue is unambiguous. *Howe v. Smith*, 452 U.S. 473, 69 L. Ed. 2d 171, 101 S. Ct. 2468 (1981). Reference to legislative history is not necessary where the language of a statute is clear. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989).

For scores of years, it has been recognized that every word, clause, and part of a statute must be given effect. *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208, 76 L. Ed. 704, 52 S. Ct. 322 (1931). More recently, in *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633, 37 L. Ed. 2d 207, 93 S. Ct. 2469 (1973), the Court reiterated "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." (citations omitted).

With these principles in mind, the holding of the Seventh Circuit cannot stand. The Seventh Circuit held that the exception applies to facilities that *are themselves* consumer products in consumer use, as opposed to facilities that *contain* consumer products. Judge Posner concluded that § 9601(9) is unambiguous having not relied upon legislative history or other sources for his interpretation. Detrex agrees that the definition and its exception are clear. There was error, however, because the interpretation of the Seventh Circuit renders meaningless the last three words of the exception to the definition of facility contrary to the well established rule that every word and phrase of a statute must be given effect. *Weinberger*, 412 U.S. at 633. Judge Posner did not consider the last phrase of the exception "or any vessel."

The exception unambiguously provides that any consumer product in consumer use or in any vessel does not fall under the definition of facility. As framed by the Seventh Circuit, the issue is whether the exception applies to hazardous substances or upon the physical objects in which these materials are contained in or transported in such as a tanker truck. The disjunctive language of the statute clearly establishes that the exception applies to facilities and vessels that contain hazardous substances. The exception excludes "any consumer product in consumer use" or "any consumer product in . . . any vessel." The alternative construction of the phrase is to read the exception as excluding all vessels. Congress could not have intended to exclude all vessels from the definition of facility. Therefore, the exception applies to consumer products in consumer use or consumer products in any vessel. The Seventh Circuit's opinion to the contrary was erroneous.

Judge Posner indicated that a can of lye is an example that would fall under the exception. Under the interpretation of the Seventh Circuit, it is the can that would not

be a facility by definition and, therefore, fall under the exception. The can is not the environmental concern, it is the lye inside the can that impacts the environment and not the can itself. Under CERCLA, there is no logical distinction, other than quantity, between a can of lye and a tanker truck full of TCE or some other useful albeit hazardous chemical. Since the can and the truck themselves do not pose threats to the environment, the intent of the exception must necessarily focus on the hazardous substance contained within the facility or vessel.

The statutory scheme and other provisions of CERCLA support Detrex's position that the exception applies on these facts. Statutory provisions cannot be read in a vacuum. This Court has held that "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treas.*, 489 U.S. 803, 809, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989).

Liability under CERCLA is not absolute and, as discussed, there are a variety of exceptions to liability. For example, spills of petroleum, no matter how large or small, are not covered by CERCLA. Additionally, the courts have concluded that asbestos is not within CERCLA's domain. Several other statutory provisions enforce Detrex's argument that delivery spills of a useful consumer product which also happens to be a hazardous substance do not give rise to CERCLA liability. Such spills of hazardous substances may give rise to liability under other statutes like the HMTA or under common law theories. Further, while there are no cases interpreting § 9656 of CERCLA, it is instructive on this issue. Section 9656(b) of CERCLA provides that:

1. a common or contract carrier is not liable under CERCLA;
2. for a release of a hazardous substance during the course of transportation;

3. if the transportation began prior to the effective date of the listing and regulation of the substance under the Hazardous Materials Transportation Act, 49 U.S.C.A. §§ 1801, *et seq.*; or

4. for substances listed pursuant to § 9656(a), prior to the effective date of such listing.

In addition, the definition of owner and operator in §§ 9601(20)(B) and (C) provides transporter liability exceptions. Common or contract carriers are exempted from CERCLA liability under certain conditions. The legislative history of CERCLA is replete with statements of concern about the application of CERCLA "to transportation and commerce and the burdens which such application would impose." 126 CONG. REC. S30949 (daily ed. Nov. 24, 1980) (statement of Sen. Cannon).

Detrex cites these provisions and statements not for the purpose of arguing their application to this case, but rather, to demonstrate, in part, the statutory scheme of CERCLA. CERCLA has exceptions to liability, several of which apply to the transportation of hazardous substances. The exception applicable here, taken in context, negates CERCLA liability as to Detrex because it was transporting a useful consumer product. The application of this exception is supported by other provisions within CERCLA. The other provisions reflect a Congressional intent to negate liability of common or contract carriers for spills during the course of transportation. That circumstance, spills during transportation, does not give rise to CERCLA liability; however, other causes of action may be applicable. Similarly, Detrex argues that the exception found in § 9601(9) negates its liability under CERCLA, although liability may have existed under other statutory or common law theories.

B. The Interpretation of § 9601(9) Presents an Important Question of Federal Law.

This case presents important questions of national significance to a wide range of the environmentally-regulated business community. Because of the importance of this case to chemical manufacturers and suppliers, shippers, common and contract carriers, and ultimately the consumer, the Court should grant this petition. The issue here concerns useful chemicals consumer products which also happen to be regulated hazardous substances. These materials have become indispensable to every facet of our lives. For example, chemicals are used to make automobiles and textiles. They are also used in the health care and education professions and in a multitude of other industries.

Tons of chemicals consumer products are transported every day in the United States. "[T]he Department of Transportation estimates that approximately 4 billion tons of regulated hazardous materials are transported each year and that approximately 500,000 movements of hazardous materials occur each day." [1] It is estimated that about 520 million tons of chemicals and allied products were shipped by truck, rail, ship, and other means in 1992.[2] Chemical transportation is economically significant.[3] Useful chemicals, which are also regulated hazardous substances, are moved by truck, rail, and over water.[4] A large segment of the environmentally regulated

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[1] 49 U.S.C.A. App. § 1801 HISTORICAL AND STATUTORY NOTES, Congressional Findings: 1990 Amendment.

[2] CHEMICAL MANUFACTURERS ASSOCIATION, U. S. CHEMICAL INDUSTRY STATISTICAL HANDBOOK 151 (1993).

[3] "The volume of chemical and allied products moved within the United States is important to the transportation services industry, generating nearly $10 billion in revenues for trucking companies, railroads, barge operators, and other carriers." *Id.*

[4] For example:

> About 52 percent of all chemicals and allied products tonnage is shipped by trucks. In 1992, an estimated 269 million tons

community has more than a passing interest in how the definition of facility is to be interpreted.

C. There is a Split of Authority Among the Circuits Concerning the Scope of the Exception.

The decision of the Seventh Circuit is in direct conflict with another federal circuit court decision. In *Dayton Indep.*, plaintiffs brought suit to recover response costs incurred in removing ceiling and fireproofing products which contained asbestos from school buildings. According to the plaintiffs, § 9607 granted them a cause of action against the generator-suppliers manufacturers who released the asbestos by placing it in the building materials which found its way into the schools.

After discussing the term disposal, the Fifth Circuit focused upon the definition of facility and its exception. It held that:

> [T]he provision expressly exempts consumer products from the definition of facility for purposes of determining liability under the statute. 42 U.S.C. § 9601(9). Appellants assert that this exemption

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were shipped via this mode. About 65 percent of the chemicals shipped via trucks is by truckloads for hire and about 5 percent is via less-than-truckload for hire. The U.S. chemical industry generates about $4.4 billion in revenues to the trucking industry. The remaining 30 percent of chemicals shipped via trucks is by private carriers (i.e. chemical companies.)

Over the past several decades, trucks have taken market share from the railroads in transporting chemicals because of the flexibility and quick delivery that this mode of transport offers. This has become increasingly important with the advent of lean manufacturing and just-in-time (JIT) inventory management techniques. Trucks have increasingly been used for bulk shipments of intermediate chemicals, although trucking is most widely used for small-volume packaged chemical products. Trucks are the most common mode of transport used in shipping industrial gases and consumer products.

Id.

> applies to the "facility" into which they allegedly disposed of the asbestos—the building materials. Since the building materials are without a doubt consumer products, they cannot be held liable for disposing of asbestos "at a facility".
>
> . . . The provision exempting consumer products obviously was meant to protect from liability those who engage in production activities with a useful purpose, as opposed to those engaged in the disposal of hazardous substances. It is clear that Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products. Rather, taken in context, the provision reflects Congress' desire to hold liable those who would attempt to dispose of hazardous wastes or substances under various deceptive guises in order to escape liability for their disposal.

Dayton Indep., 906 F.2d at 1065-1066 (footnote omitted).

There are many important legal and factual similarities between *Dayton Indep.* and this case. Both lawsuits involved the recovery of response costs under § 9607(a) of CERCLA. The TCE and the asbestos containing building materials were both consumer products and useful products not hazardous wastes. The plaintiffs in both actions claimed that the suppliers and manufacturers were liable for the disposal of a hazardous substance. Also, the Fifth Circuit and the Seventh Circuit both squarely addressed the scope of the application of the exception to the definition of facility. Detrex believes that the Fifth Circuit would have favored its interpretation of the exception. There is little, if any, distinction to be made between the sale and delivery of the asbestos containing building materials supplied by the defendants in *Dayton Indep.* and the sale and delivery of TCE by Detrex.

Most importantly, the two courts differed concerning what the focus or intent of the exception is. The Seventh Circuit equated the consumer product to a facility *i.e.*, the exception applies to facilities that are consumer products.

For Judge Posner, the exception applies to the physical object which contains the hazardous substance; if it is a consumer product, the exception applies. The approach of the Fifth Circuit is diametrically opposed. In *Dayton Inden.*, the decision hinged upon the asbestos containing building products themselves; according to that Court, legitimate manufacturers and sellers of useful products were not the target of Congress when it enacted CERCLA. For the Fifth Circuit, the focus is upon the alleged contaminant contained within the facility; if the pollutant *i.e.*, asbestos containing building materials are consumer products, the exception applies. The same argument by Detrex was rejected by the Seventh Circuit. By analogy, the test of the Seventh Circuit centers on the can which contains the lye, while the Fifth Circuit focuses upon the lye within the can.

The district courts have also been struggling with this issue and are likely to continue to do so unless this Court resolves it. Detrex respectfully directs the Court's attention to the decisions in *Vernon Village, Inc. v. Gottier*, 755 F. Supp. 1142 (D. Conn. 1990) and *Electric Power Bd. of Chattanooga v. Westinghouse Electric Corp.*, 716 F. Supp. 1069 (E.D. Tenn. 1988) in support of its argument. Respondents are relying on cases like *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218 (E.D. Pa. 1993) and *CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F. Supp. 432 (D.N.H. 1991).

The Court grants petitions for certiorari based upon conflicts among district courts. In *United States v. Constantine*, 296 U.S. 287, 290, 80 L. Ed. 233, 56 S. Ct. 223 (1935), the Court granted a petition for writ based upon, in part, "the many other cases pending in which action is awaiting authoritative settlement of the question presented." The Court is requested to again follow this precedent.

D. The Court has the Opportunity to State a Complete and Understandable Rule of Law.

This issue is a straightforward one involving conflicting interpretations of an unambiguous definition in CERCLA. The Court can resolve this argument with a clear rule on § 9601(9) and its exception. Does the exception apply to deliveries of useful consumer products which also happen to be hazardous substances and thus exempt these materials from CERCLA liability? Or, does the exception have no application, leaving Detrex and other commercial suppliers and transporters liable under CERCLA because the definition of facility includes accidental delivery spills of these consumer products from tanker trucks, rail cars, and ships?

II. CERCLA LAWSUITS BETWEEN PARTIES UNDER § 9607(a) ARE ACTIONS FOR CONTRIBUTION REQUIRING AN EQUITABLE ALLOCATION.

A. Detrex was Entitled to an Equitable Allocation After the Imposition of Joint and Several Liability.

This issue involves two closely related provisions of CERCLA, specifically § 9607(a) and § 9613(f)(1). Section 9607(a) is the liability provision within CERCLA which creates certain categories of responsible parties. By creating four categories of strictly liable parties under § 9607(a), Congress intended for the section to further its chief goal of prompt cleanups. This section of CERCLA was a part of the original 1980 enactment and gave the United States Environmental Protection Agency a strong enforcement tool. Section 9613(f)(1) was added to CERCLA in 1986 to reduce the harsh effects of strict and joint and several liability. Equitable apportionment is accomplished via § 9613(f)(1) in the nature of contribution by which the liability percentage of each party is established. The purpose of § 9613(f)(1) was to codify

the *already existing* right of CERCLA parties to gain contribution under § 9607(a).[5]

In the Seventh Circuit, Detrex argued that a second lawsuit should not be required to obtain an apportionment. These two sections work in tandem, they do not create separate causes of action. Liability is imposed under § 9607(a) and liability percentages are assigned using § 9613(f)(1) for guidance. Respondents' lawsuit against Detrex was filed under only § 9607(a) of CERCLA and is technically one for contribution. If a non-governmental party files a CERCLA § 9607(a) action, both liability and apportionment should be determined in the same proceeding. The Seventh Circuit rejected this analysis reasoning that Detrex could have filed a separate counterclaim and not be out of pocket more than its fair share. Detrex attempted to file such a counterclaim, however, the District Court denied the motion as untimely. The practical effect of the Seventh Circuit's opinion is to deny an allocation unless a formal claim is made under § 9613(f)(1). Pure § 9607(a) claims, in the Seventh Circuit, now result in CERCLA defendants being liable for all cleanup costs unless a counterclaim or second lawsuit is filed.

Nothing in the express language of CERCLA prevents both liability and contribution issues from being addressed in § 9607(a) lawsuits. Private actions between CERCLA litigants are for contribution.[6] The case law also overwhelmingly favors Detrex's position. In *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), plain-

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[5] H.R. REP. No. 99-253(I), 99th Cong., 2d Sess. 59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2861. "This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances."

[6] Russo, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267, 273 (1989).

tiff brought suit to recover response costs under CERCLA. After concluding that the plaintiff was jointly and severally liable with the defendant for response costs, the Fifth Circuit held that "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA. *See* § 9613(f)." *Amoco Oil*, 889 F.2d at 672. The Third Circuit agrees with this holding.[7]

In *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), the Court provided further support for Detrex's position that liability percentages should be assigned in § 9607(a) lawsuits. The plaintiff filed an action "under § 9607(a)(4)(B)" for past and future response costs. *In re Dant & Russell*, 951 F.2d at 247. The Ninth Circuit expressly held that § 9613(f)(1) was applicable because the lawsuit was a claim under § 9607(a) of CERCLA. Equitable apportionment under § 9613(f)(1) was explicitly authorized after liability was established under § 9607(a). *In re Dant & Russell*, 951 F.2d at 249.

A substantial number of district court opinions have also apportioned liability in § 9607(a) lawsuits. In *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420 (D. Md. 1991), the Court allocated damages in a § 9607 (a) lawsuit between two strictly liable parties. The Court in *United States v. Asarco, Inc.*, 814 F. Supp. 951, 956

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[7] In *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 n.29 (3d Cir. 1992), the Third Circuit explained that:

> [I]n a sense, the "contribution" inquiry involves an analysis similiar to the "divisibility" inquiry, as both focus on what harm the defendant caused. However, we believe that this inquiry, to the extent that it is the same as that discussed in above-noted cases, is best resolved at the initial liability phase and not at the contribution phase since it involves precisely relative degrees of *liability*. Thus, if the defendant can prove that the harm is divisible and that it only caused some portion of the injury, it should only be held liable for that amount. In our view, the logical consequence of delaying the apportionment determination may well be drastic . . . .

(D. Colo. 1993) concluded "that where parties are jointly and severally liable under CERCLA, response costs can only be shifted by one party to another by way of contribution." In *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp. 1132, 1139 (D.R.I. 1992), the District Court held that "[i]t is clear from the analysis of CERCLA and the history behind it that the plaintiffs' claim, whatever it's called, is one for contribution."

Respondents' lawsuit was filed under § 9607(a) of CERCLA for the recovery of response costs requiring a two step analysis. The first step of the analysis is to determine if liability exists under § 9607(a). Both Respondents and, arguably, Detrex are liable under § 9607 (a). Therefore, the second step of the analysis should require a liability allocation between the two parties instead of severally imposing all response costs upon Detrex. This lawsuit is a dramatic example of why equitable allocation issues under § 9613(f)(1) should be considered in § 9607(a) actions. Although Detrex denies CERCLA liability, the most it can be responsible for is a very small percentage of all the TCE at the facility. Despite what is at worst an extremely minor and localized contribution, Detrex is liable for all past and future response costs totalling millions of dollars. Assigning liability percentages could have prevented this inequitable result.

The Tenth Circuit, in *County Line Inv. Co. v. Tinney*, 933 F.2d 1508 (10th Cir. 1991), explored the close relationship between § 9607(a) and § 9613(f)(1). In *County Line*, the owners of a landfill brought an action under § 9607(a) of CERCLA against a former owner for the recovery of response costs. In addition, the plaintiffs filed a count under § 9613(f)(3)(B). The District Court dismissed plaintiffs' § 9613(f) claim on the basis that the remedial action at the site was not consistent with the National Contingency Plan ("NCP"). The NCP is a set of regulations which governs how environmental

remediations must be performed. Plaintiffs argued on appeal that consistency with the NCP was not an element of a claim under § 9613(f); they asserted that they could seek contribution without reference to § 9607(a). *County Line*, 933 F.2d at 1516. The Tenth Circuit rejected plaintiffs' argument concluding that § 9607(a) is the source of a party's claim for contribution. *County Line*, 933 F.2d at 1516. After briefly reviewing some of the legislative history of § 9613(f), the Tenth Circuit held that "[n]othing in this language suggests that Congress intended to do anything more than create a mechanism for apportioning CERCLA-defined costs when it added section 113(f) to the statute." *County Line*, 933 F.2d at 1517.

The decision of the Seventh Circuit on this issue is contrary to CERCLA's unambiguous provisions and its statutory scheme. Detrex was entitled to an equitable apportionment in this § 9607(a) lawsuit. Sections 9607(a) and 9613(f)(1) must be construed together because the latter does not create a separate cause of action. The analysis proceeds in two steps: 1) strict and joint and several liability is imposed on the CERCLA parties under § 9607(a); and 2) because of the imposition of joint and several liability, a right to contribution exists as provided for in § 9613(f)(1). Section 9613(f)(1) was intended to provide for equitable allocations after CERCLA liability is imposed in § 9607(a) actions. Both liability and contribution issues should be addressed in § 9607(a) lawsuits.

B. This Petition for a Writ of Certiorari Should be Granted Because There is a Split of Authority on This Issue.

The Seventh Circuit rejected Detrex's argument in this regard and, thus, allocation issues are not addressed in § 9607(a) actions unless a counterclaim is filed. That formality should not be required and is contrary to the opinions of at least four other circuits, several district

courts, and one commentator. In the Fifth Circuit under the *Amoco Oil* decision, when one party sues another, it is an action for contribution. In *Alcan Aluminum*, the Third Circuit held that the contribution inquiry should be addressed at the initial liability phase under § 9607(a). Section 9613(f)(1) must be applied in § 9607(a) claims in the Ninth Circuit as decided in *In re Dant & Russell*.

The decisions of the Third, Fifth, Ninth, and Tenth Circuits directly conflict with Judge Posner's opinion. Only in the Seventh Circuit are allocation percentages not assigned in § 9607(a) actions. In the Seventh Circuit, a formal counterclaim or even a second lawsuit is necessary to obtain an assessment of liability shares. No such technical requirement exists in any of the other four circuits which have addressed the issue. The Seventh Circuit's interpretation of the relationship between § 9607(a) and § 9613(f)(1) directly conflicts with the decisions in four other circuits. Because a conflict exists among the circuits, Detrex's petition for a writ of certiorari should be granted.

C. This Issue Presents an Important Question of the Proper Interpretation of a Federal Environmental Statute.

The interpretation of the relationship between § 9607(a) and § 9613(f)(1) is of great significance to virtually all CERCLA parties because of the allocation issue which concerns who pays how much for remediations. The practical effect of the Seventh Circuit's opinion eliminates the right of litigants to obtain an equitable allocation of liability unless a formal claim is made. Such a result was not intended by Congress when it added § 9613(f)(1) to CERCLA in 1986.

According to the Seventh Circuit, an assessment of each litigant's liability is not appropriate in a § 9607(a) action unless a formal counterclaim or a second lawsuit is filed. Under this approach, CERCLA plaintiffs can

obtain a recovery of all past and future response costs under § 9607(a) and be *immune* from a claim for contribution effectively eliminating an allocation of liability. Stated hypothetically, the Respondents herein could have entered into a settlement, embodied in a consent decree, with the United States Environmental Protection Agency or the Indiana Department of Environmental Management. The terms of the consent decree would dictate the requirements of the remediation. Respondents would incur response costs in conducting the investigation and remediation.

By virtue of the settlement with the government, however, Respondents could then be entitled to contribution protection under § 9613(f)(2) of CERCLA. Section 9613(f)(2) immunizes parties who settle with the government from contribution actions by others "regarding matters addressed in the settlement." Thus, had the Respondents settled with the government for the investigation and cleanup of their facility, they could have received contribution protection.

Continuing with this hypothetical, Respondents could then file suit against Detrex for the recovery of response costs pursuant to § 9607(a). Under the Seventh Circuit's interpretation of this issue, Respondents would be able to recover all of their response costs from Detrex in that proceeding. According to Judge Posner, Detrex could avoid being out of pocket by filing a counterclaim or a second lawsuit under § 9613(f)(1). Detrex, however, would be precluded from doing so because the Respondents would have contribution protection by operation of § 9613(f)(2). Respondents could recover all of their response costs from Detrex under § 9607(a). Detrex would have no right of contribution against Respondents because of § 9613(f)(2)'s preclusive effect.

Such a result could not have been intended by Congress. The goals of CERCLA are prompt cleanups and fair-share liability allocations among those responsible for

the contamination. Under the Seventh Circuit's rationale, parties will enter into settlements with the government and be able to recover all response costs under § 9607(a) and be immune from contribution claims. Because of the real danger presented by the opinion of the Seventh Circuit, allocation issues must be addressed in § 9607(a) actions. If the decision of the Seventh Circuit stands, CERCLA defendants nationwide will be jointly and severally liable to settling parties for all cleanup costs and unable to obtain contribution. This very real circumstance justifies granting Detrex's petition for a writ of certiorari.

D. This Issue Should be Resolved with an Uncomplicated Rule of Law.

The resolution of this issue is not complex. Simply, the issue is whether private CERCLA parties are entitled to an equitable allocation of liability in § 9607(a) actions. The language of CERCLA and many court decisions favor an affirmative answer to this issue. To hold otherwise invites an injustice because subsequent contribution actions can be negated by virtue of the contribution protection afforded under § 9613(f)(2). This petition for a writ of certiorari should be granted because the Court can provide clear guidance on this issue.

CONCLUSION

Detrex's petition for a writ of certiorari should be granted with respect to both issues. The facility issue is of vital significance to a very large section of the Nation's economy. The decision of the Seventh Circuit is in direct conflict with at least three other circuits with respect to the allocation issue. If the Court decides to consider this case, it could fashion clear and necessary rules of law and possibly promote cleanup efficiency. For all of the reasons detailed in this petition, Detrex respectfully requests that this case be heard.

Respectfully submitted,

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Dated: November 5, 1993

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2365

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Plaintiffs-Appellees,

v.

DETREX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
No. 88 C 620—Robert L. Miller, Jr., *Judge*

ARGUED JANUARY 4, 1993—DECIDED AUGUST 12, 1993

Before POSNER, FLAUM, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* This appeal requires us to explore the outer limits of the "Superfund" statute—the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* We must decide whether, as the district court concluded, the Act extends to any chemical spill that creates an environmental hazard. This is an important question that has not until now been the subject of an appellate case.

Our conclusion is that the spiller, but not the shipper of the chemical that spilled, is within the Act's long reach.

The facts are simple enough, and we shall make them even simpler where we can do so without affecting the analysis. The principal plaintiff Elkhart (Amcast is its parent, and can be ignored), manufactures copper fittings at a plant in Indiana. One of the chemicals that it uses in the manufacturing process is the solvent trichloroethylene (TCE). Elkhart used to buy TCE in liquid form from a number of chemical manufacturers, including the defendant, Detrex. Detrex sometimes delivered the solvent in its own tanker trucks and sometimes hired a common carrier, Transport Services, to deliver it. In 1984, TCE was discovered in the groundwater beneath a pharmaceutical plant adjacent to Elkhart's plant. There is evidence that both Detrex's and Transport Services' drivers sometimes spilled TCE accidentally on Elkhart's premises while trying to fill Elkhart's storage tanks and that some of this spillage found its way into the groundwater beneath the pharmaceutical plant, although an expert hired by Detrex has estimated that out of almost 800 gallons of TCE that have been found in the soil and groundwater beneath the pharmaceutical plant, no more than 49 came from these delivery spills, the rest having leaked from the storage tanks or a waste-disposal pit or the plant itself or been spilled by other suppliers' drivers.

The Superfund statute, so far as bears on this case, imposes liability for "response costs" (the costs of eliminating an environmental hazard) on the "owner and operator of a . . . facility" from which a hazardous substance has been released, § 9607(a)(1), and on "any person who by contract . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person." § 9607(a)(3). "Facility" is broadly defined as "(A) any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impound-

ment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9). Elkhart is admittedly a "responsible person," as an entity liable for response costs is called; but the statute permits one responsible person to recover all or part of its response costs from another. § 9607(a)(4)(B). Having spent more than $1 million on cleaning up the contamination caused by the spillage of TCE from its facility, Elkhart brought this suit to establish that Detrex was a responsible person, too, and to shift Elkhart's response costs (that is, the $1 million it had incurred in cleaning up the contamination) from itself to Detrex.

A potentially responsible person who, like Detrex, has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable to the conduct of the plaintiff as district from that of the defendant. § 9613(f). Rather than file a counterclaim against Elkhart, Detrex argued to the district judge that in the course of adjudicating Elkhart's claim he had to apportion responsibility for the costs between the parties. The judge rejected this argument, together with Detrex's more fundamental argument that it is not a responsible person within the meaning of the statute, and entered judgment in favor of Elkhart for the entire response costs that Elkhart had incurred. Eventually Detrex filed a separate action for contribution from Elkhart; that suit is pending in the district court. § 9613(f)(1); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 n. 2 (6th Cir. 1991). Detrex was entitled to proceed in that fashion. The statute is explicit that a counterclaim for response costs is not compulsory, §§ 9613(f)(1), (g)(3)(A), a result consistent with general law. Detrex's claim against Elkhart, dependent as it was on Elkhart's establishing Detrex's liability to it, had not matured when Elkhart's suit was filed. Fed. R. Civ. P. 13(a); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 360

(7th Cir. 1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1411 at p. 83 (2d ed. 1990).

The argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense, so we dispatch it at the outset. The statute is clear that whoever (like Elkhart) incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as Detrex does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct. *United States v. R.W. Meyer, Inc., supra,* 932 F.2d at 571 n. 2; *United States v. Mexico Feed & Seed Co.,* 764 F. Supp. 565, 573 (E.D. Mo. 1991), rev'd in part on other grounds, 980 F.2d 478 (8th Cir. 1992). The counterclaim if promptly filed will doubtless be tried at the same time as the main claim, so the defendant will at no time be out of pocket by more than the share of the response costs attributable to his own conduct. Obviously Detrex could have counterclaimed without giving up its main argument—that it is not a responsible person and therefore is not liable for any part of the response costs. We do not know why it waited and filed a separate suit.

The difficult question is whether Detrex is within the grasp of the Superfund law at all; if not, Elkhart's suit must fail irrespective of any division of responsibilities between Elkhart and Detrex. Elkhart argues that Detrex has forfeited this ground of appeal by failing to present it to the district court. Detrex had argued to the district court on a variety of grounds that it was not liable to the plaintiff under that law, and one of these grounds was that it was not an arranger for disposal or treatment. The fact that it did not marshal in support of this ground all the relevant legislative provisions and history did not work a forfeiture. *Dawson v. General Motors Corp.,* 977 F.2d

369, 372 n. * (7th Cir. 1992); *Locke v. Bonello*, 965 F.2d 534, 536 n. 1 (7th Cir. 1992); cf. *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10 (1976); but see *Elder v. Holloway*, 975 F.2d 1388, 1392-93 (1991), rehearing en banc denied, 984 F.2d 991 (9th Cir. 1993) (per curiam), cert. granted, 61 U.S.L.W. 3868 (U.S. June 29, 1993). But Detrex tacitly conceded in the district court that it was, though not an arranger for disposal, an owner of a facility, within the meaning of the statute. Detrex thus conceded a ground that it now seeks to raise with us, that it was not an owner of a facility; and failure to have presented to the district court a ground on which reversal is being urged is a more serious matter than failing to support a ground with the arguments or authorities that the appellate court finds persuasive. The rule in civil cases is that except with regard to jurisdictional issues and issues involving comity—the mutual respect owed by sovereigns and quasi-sovereigns, such as the states—a ground not raised in the district court cannot be used to reverse that court. *Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269, 276-77 (7th Cir. 1991); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1544 (7th Cir. 1985), aff'd by an equally divided Court under the name *Hartigan v. Zbaraz*, 484 U.S. 171 (1987). The Supreme Court has told us, however, that the rule is not absolute, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); see also *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *id.* at 86 (concurring opinion); *U.S. National Bank v. Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173, 2178-79 (1993), a point upon which we have built in carving an exception for plain errors in civil cases. (The civil rules contain no counterpart to Rule 52(a) of the criminal rules, which allows reversal on the basis of plain errors even if they had not been drawn to the attention of the trial court.) *Deppe v. Trippe*, 863 F.2d 1356, 1362 (7th Cir. 1988). Occasional flat statements in our cases that there is no plain error doctrine in civil cases, e.g., *United States v. Caputo*, 978 F.2d 972, 974 (7th Cir. 1992), which puzzled the

court in *Hudak v. Jepsen of Illinois*, 982 F.2d 249, 251 n. 1 (7th Cir. 1992), implicitly refer to error *in jury instructions*, a setting to which Rule 51 of the civil rules has been interpreted to make the doctrine of plain error inapplicable. *Deppe v. Trippe, supra*, 863 F.2d at 1361-62.

Forfeiture is a sanction, and sanctions should be related to harm done or threatened. In the rare case in which failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note, we have the power and the right to permit it to be raised for the first time to us. *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1306 n. 7 (7th Cir. 1988); *Charlton v. United States*, 743 F.2d 557, 561 n. 5 (7th Cir. 1984) (per curiam). This is a suitable case in which to exercise our power of lenity. The new ground is fully argued in the brief of the appellant, so that Elkhart had—and it took—a full opportunity to respond. The ground rests entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review which is plenary on matters of law. It is unrealistic to think that if Detrex had made the argument to the district court and prevailed, there would have been no appeal. The appeal just would have been filed by Elkhart rather than by Detrex. The issue having been fully briefed and argued, there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now.

Each of the tanker trucks owned by Detrex in which it delivered TCE to Elkhart constituted prima facie a "facility" within the meaning of the Superfund law, § 9061(9)(A), contained a hazardous substance, namely TCE, and "disposed of" it when the truck spilled it, because the statute defines disposal to include spilling. §§ 6903(3), 9601(29). The statutory definition of facility excludes, however, a "consumer product in consumer use."

§ 9601(9). Neither party suggests that the term "consumer product" is limited to products used by consumers as distinct from ones consumed by business firms and other institutions. *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059, 1065-66 (5th Cir. 1990), holds correctly in our view, that asbestos products incorporated into walls and ceilings of school buildings are consumer products within the meaning of the Superfund law. The difficult question is whether the reference to consumer product in section 9601(9), the definition of "facility," is to be read literally.

If it is read literally, the only consumer product exempted by the statute is the consumer product that is a facility. The alternative is to read the exemption as referring to facilities that *contain* consumer products. Under this alternative reading, as long as Elkhart was using TCE in its plant in the ordinary course, with no spills or leaks, it was not the owner of a "facility" within the meaning of the statute. The *Dayton* decision even suggests that the school buildings themselves might have been consumer products within the meaning of the statute, 906 F.2d at 1065 n. 4, and likewise Elkhart's plant, so long as it was merely manufacturing useful products and not creating hazardous wastes. That, however, would be an extraordinarily strained reading of "consumer product."

Once Elkhart finished using the TCE in its manufacturing process—once consumer use passed over into waste disposal, as happened when Elkhart dumped the used TCE into a waste-disposal pit on its premises—Elkhart became, if the statutory reference to a facility that is a consumer product is interpreted to mean a facility that contains a consumer product, a responsible person, as a facility owner no longer sheltered by the exception for consumer products in consumer use. Continuing with this interpretation of the consumer-product exception, and assuming reasonably enough that the transportation of a consumer product to the customer is as much a consumer

use as the consumption of the product in the customer's manufacturing process (the trucks themselves might be thought consumer products, within the extended meaning attached to this term in the *Dayton* footnote, but we reject so strained an interpretation of the term), we would conclude that until the TCE transported in Detrex's trucks spilled, it was a consumer product in consumer use. It ceased to be in consumer use when it spilled; but the spilled TCE was no longer in the trucks or any other property owned by Detrex, and when it hit the ground it was in premises owned by Elkhart, and Elkhart thus became the facility owner and a responsible person.

This approach does excessive violence to the statutory language. The exception is for facilities that *are* consumer products in consumer use, not for consumer products contained in facilities. Although read as it is written the exception is narrow, it is not meaningless, for the statute defines "facility" so broadly that it could be thought to include a can of lye. Since Detrex, not Elkhart, was responsible for the environmental damage resulting from the spillage of TCE from Detrex's trucks, there is no anomaly, so far as the purpose of the Superfund statute is concerned, in deeming Detrex a responsible person along with Elkhart. A literal interpretation that furthers the statute's purpose is hard to beat.

Irrespective of the issue of consumer product and consumer use, however, Detrex was a responsible person with respect to the TCE that was spilled by trucks owned by Transport Services only if by hiring Transport Services to carry the stuff to the Elkhart plant Detrex "arranged with a transporter for transport for disposal or treatment" of TCE. § 9607(a)(3). Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines disposal to include spilling, the critical words for present purposes are "arranged for." The words imply intentional action. The only thing that Detrex arranged for Transport Services

to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground. No one arranges for an accident, except in the sinister sense, not involved here, of "staging" an accident—that is, causing deliberate harm but making it seem accidental.

Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. (The Superfund statute does not define "arrange for.") Elkhart argues that we can tell that Congress was doing that here because the provision in question speaks of "disposal" and we know that "disposal" includes accidentally spilling. But since context determines meaning, the same word can mean different things in different sentences—to monopolize a conversation doesn't mean the same thing as to monopolize the steel industry—even in the same statute, especially when the statute does not attempt to impose a single meaning by defining the word. In the context of the operator of a hazardous-waste dump, "disposal" includes accidental spillage; in the context of the shipper who is arranging for the transportation of a product, "disposal" excludes accidental spillage because you do not arrange for an accident except in the Æsopian sense illustrated by the staged accident.

The words "arranged with a transporter for transport for disposal or treatment" appear to contemplate a case in which a person or institution that wants to get rid of its hazardous wastes hires a transportation company to carry them to a disposal site. If the wastes spill en route, then since spillage is disposal and the shipper had arranged for disposal—though not in that form—the shipper is a responsible person and is therefore liable for clean-up costs. But when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines. It would be an extraordinary thing to make

shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1180-81 (7th Cir. 1990). The language of the statute permits but does not compel such a result, and we can find no evidence that it was intended.

This conclusion does not create a regulatory void. Apart from common law liability of transportation companies for chemical spills, noted in our *Indiana Harbor Belt R.R.* decision, there are a variety of direct regulatory controls over the transportation of hazardous substances, illustrated by the Hazardous Materials Transportation Act, 49 U.S.C. App. §§ 1801 *et seq.* And Elkhart was responsible for the cost of cleaning up the contamination resulting from the spillage from Transport Service's trucks if it couldn't find any other responsible persons to whom to shift that cost in whole or in part.

We conclude that Detrex was liable under the Superfund statute for the spillage from its own trucks (though it may be able to shift some of that liability back to Elkhart by means of the counterclaim) but not the spillage from the trucks of the common carrier that it hired. The judgment for Elkhart is therefore affirmed in part and reversed in part and the case remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620 (RLM)

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs,

vs.

DETREX CORPORATION,
Defendant.

MEMORANDUM AND ORDER

Following the order of November 18. 1991 granting in part and denying in part the parties' cross-summary judgment motions, the court continued the trial and afforded the plaintiffs, Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast"), until December 16 to move for partial summary judgment on the issue of damages. Amcast has filed its motion, and the briefing is now complete. The court assumes familiarity with the facts set forth in the November 18 order and with the procedural history of this case.

The court acknowledges both parties' requests for oral argument on this motion, but declines to hold an oral argument in light of the court's heavy calendar between now and the scheduled trial and the court's familiarity with the case.

At the pretrial conference held on November 25, 1991, the plaintiffs indicated that they would dismiss their negli-

gence and punitive damages claims without prejudice if this second motion for partial summary judgment is granted; if the motion is denied, these claims are scheduled for trial on May 11, 1992. In this motion, Amcast asks the court to grant summary judgment as to the liability of defendant Detrex Corporation ("Detrex") in Count II of the complaint pursuant to 42 U.S.C. § 9607(a)(3), as to the amount of response costs Amcast is entitled to recover under Counts I and II of the complaint, and as to Detrex's liability for Amcast's future costs in responding to the trichloroethylene ("TCE") contamination at the Elkhart Products Corporation ("EPC") facility.

I. THE MOTION TO AMEND AND ADD A COUNTERCLAIM

As a preliminary matter, on February 7, 1992, Detrex moved for leave to amend its answer to include a counterclaim under 42 U.S.C. § 9613. Trial is scheduled to commence on May 11, and the suit has been pending for four and a half years. Leave to amend is to be freely given when justice so requires, Fed. R. Civ. P. 15(a), but determination of the requirements of justice rest within the trial court's discretion. *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 927 (7th Cir.), *cert. denied* 111 S.Ct. 127 (1990). Delay alone is not a sufficient basis for denial of a requested amendment, *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988), but a presumption against amendment grows with delay. *Tamari v. Bache & Co. S.A.L.*, 838 F.2d 904, 908 (7th Cir. 1988).

> The burden to the judicial system can justify a denial of a motion to amend "even if the amendment would cause no hardship at all to the opposing party." Because substantive amendments shortly before trial serve to defeat the public's interest in speedy resolution of legal disputes, "[a] district court judge is entitled, in such circumstances, to refuse to allow a plaintiff's amendment."

Perrian v. O'Grady, No. 90-1267, slip op. at 5 (7th Cir., March 19, 1992) (citations omitted).

The motion to amend was made three months before trial, after years of discovery and the filing of serial summary judgment motions. As is discussed below, denial of the amendment will not prejudice Detrex's right to pursue its would-be counterclaim in a separate action. Accordingly, while amendment to these pleadings would jeopardize the trial date of a suit in its fifth year of pendency, the motion's denial will prejudice nobody.

For these reasons, the court now denies the motion to amend.

II. AMCAST'S SUMMARY JUDGMENT MOTION

A. Count II

Amcast claims that it is entitled to summary judgment on Detrex's liability in Count II because the court has already found that Detrex arranged for the disposal of hazardous substances on the EPC site. In a cost recovery action under 42 U.S.C. § 9607(a)(4)(B), a private party must show that: (1) the defendant is a covered person under 42 U.S.C. § 9607(a); (2) there has been a release or threatened release of a hazardous substance from the defendant's facility; (3) the plaintiffs incurred response costs as a result of the release or threatened release; and (4) the plaintiffs' response costs were necessary and consistent with the national contingency plan ("NCP"). *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989); *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 963-64 (D. Conn. 1991); *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1278-79 (D. Del. 1987), *affirmed*, 851 F.2d 643 (3d Cir. 1988). Amcast notes that CERCLA liability is strict. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d at 1150; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670, n.8 (5th Cir.

1989); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1456 (N.D. Ind. 1990). The elements of a prima facie case are straightforward and several courts have found that liability may be resolved in a summary judgment motion. *United States v. Bliss*, 667 F. Supp. 1298, 1308-09 (E.D. Mo. 1987).

Amcast claims that each element of a prima facie case for Detrex's liability under 42 U.S.C. § 9607(a)(3) (arranging for disposal of hazardous substances) has been established by the November 18, 1991 order. Detrex was found to have released hazardous substances into the environment, and Amcast was found to have incurred costs that were necessary and consistent with the NCP. Detrex cannot avail itself of the statutory defenses to liability: the environmental contamination did not result from an act of God, an act of war, or an act of a completely independent third party. The November 18 order found that Detrex's drivers or Detrex's contractor, Transport Services, were responsible for spills which occurred between 1978 and 1986; therefore, Detrex is a responsible party within the meaning of 42 U.S.C. § 9607(a)(3). Further, Detrex "disposed" of a hazardous waste when it spilled TCE at the EPC site. Amcast contends that the law of the case establishes the remaining elements of CERCLA liability. The November 18 order determined that Amcast incurred cleanup costs that were necessary and consistent with the NCP.

Detrex responds that Amcast's motion for summary judgment on Count II goes beyond the order of November 25. That order allowed the plaintiffs until December 16, 1991 to file a motion as to damages, but did not allow the plaintiffs to file another motion for summary judgment on liability. Therefore, Detrex asks the court to ignore the portion of the motion which requests summary judgment as to liability under Count II.

Amcast suggests that the motion for summary judgment on Count II is made in the interest of judicial economy,

as it would tie up loose ends in this litigation and allow for the presentation of a complete record on appeal. Amcast also claims that a finding of Detrex's liability under Count II would not affect Detrex's liability for damages; whether Detrex is liable under Count I or II or both, it is jointly and severally liable for Amcast's response costs.

In the alternative, Detrex asks the court to reconsider the November 18 order and grant summary judgment in Detrex's favor on Count II. However, a motion for reconsideration should not be used to relitigate matters upon which the court has ruled. *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976). If the motion for reconsideration does not demonstrate manifest error of law or fact or present newly discovered evidence, it should be denied. *Dresser Industries, Inc. v. Pyrrhus Ag*, 936 F.2d 921, 936 (7th Cir. 1991). Detrex's arguments as to Count II do not demonstrate manifest error or present newly discovered evidence. Therefore, the court will not reconsider Detrex's motion for summary judgment as to Count II.

The court finds that, in light of the order of November 18, 1991, summary judgment should be granted in the plaintiffs' favor as to Count II, except as to any allegations related to an overfill spill.

B. Count I

1. Joint and Several Liability

Detrex argues that CERCLA liability may be several rather than joint and several, and that Detrex should be allowed to show either the divisibility of the harm or the degree of harm caused by Detrex. Detrex cites *United States v. Hardage*, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987), in which the court stated:

> A careful review of the legislative history of CERCLA establishes Congress wished to avoid man-

> datory joint and several liability. The Court may impose joint and several liability where the harm is single and indivisible. However, defendants must be given the opportunity to demonstrate the divisibility of the harm and the degrees to which each defendant is responsible. This determination of liability turns on whether the harm caused . . . is "divisible" or "indivisible." The Court notes that imposition of joint and several liability is permissive, but not mandatory. Congress intended issues of liability under CERCLA, including joint and several liability, to be determined under traditional and evolving principles of federal common law. The Court may also apportion damages according to "the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous wastes," and "the degree of care exercised by the parties with respet to the hazardous waste concerned." *United States v. A & F Materials Co.*, 578 F.Supp. 1249, 1256 (S.D.Ill. 1984).

(citation omitted).

Detrex suggests applying a case-by-case evaluation of the facts in order to determine whether to impose joint and several liability. *State of Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 676 (D. Idaho 1986). The Fourth Circuit applied joint and several liability in a case in which the environmental harm was indivisible among multiple generators of hazardous wastes. However, the court stated:

> While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm. In each case, the court must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially.
>
> Under common law rules, when two or more persons act independently to cause a single harm for

> which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes.

United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988) (citations and footnote omitted), *cert. denied*, 490 U.S. 1106 (1989).

Detrex acknowledges that it has the burden of demonstrating that a reasonable basis for apportionment of damages exists, *United States v. Alcan Corp.*, 755 F.Supp. 531 (N.D.N.Y. 1991); *Kelly v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1552 (W.D. Mich. 1989), and claims that it can do so. Detrex submits the affidavit of Mark Rowland, a groundwater hydrologist, to demonstrate that the harms caused by Detrex are distinct from those caused by other parties. There were, at one point, 783 gallons of TCE in the soil and groundwater beneath the EPC facility. Detrex claims that none of this TCE is attributable to the delivery spills for which it is held liable. Mr. Rowland believes that the TCE which spilled during deliveries did not reach the soil, but evaporated without causing harm to the soil or groundwater.

Mr. Rowland states that the maximum amount of TCE spilled during deliveries was 49.3 gallons. This constitutes a small percentage (6.296%) of the TCE found in the soil and groundwater. If Detrex is not responsible for all of the delivery spills, then it is responsible only for the 2.8 gallons of spillage from Detrex trucks, or .358% of the 783 gallons of TCE. Therefore, Detrex asserts that there is a reasonable basis for apportionment of damages.

This case involved but one contaminant, unlike the multiwaste cases in which apportionment was unreasonable because of the synergistic effect of commingling contaminants. In *Kelly v. Thomas Solvent Co.*, 727 F. Supp. at 1553-54, the court found joint and several liability proper because the defendants presented no evidence demonstrating that the environmental harm was divisible. In one of the contaminated sites, a mixture of pollutants

had migrated from the defendants' facilities. *See also O'Neil v. Picillo,* 682 F. Supp. 706 (D.R.I. 1988), *affirmed,* 883 F.2d 176 (1st Cir. 1989), *cert. denied,* 493 U.S. 1071 (1990).

Detrex distinguishes this case from *United States v. Ottati & Goss, Inc.,* 630 F. Supp. 1361, 1395-96 (D.N.H. 1985), in which the hazardous waste was buried in drums throughout the site. In the case at hand, Detrex maintains, the TCE contamination resulting from delivery spills was limited to the delivery area of the EPC facility.

Detrex claims that the court can apportion liability in this case based on the quantity of TCE spilled during delivery compared to the total TCE contamination found. In *O'Neil v. Picillo,* 682 F. Supp. at 725, the court found it impossible to determine which defendant's waste contributed in a specific manner to the contamination, because different substances of differing levels of toxicity could commingle and have a synergistic effect. However, the court noted: "There is no question that the number of drums may be an appropriate criterion for apportioning liability if all of the drums contained identical wastes." *See also United States v. Monsanto Co.,* 858 F.2d at 172, n.27.

For these reasons, Detrex asks the court to conduct a trial to allow it to establish the negligible amount of damages arising from its "several" liability.

Amcast cites *United States v. R. W. Meyer, Inc.,* 889 F.2d 1497 (6th Cir. 1989), *cert. denied,* 494 U.S. 1057 (1990), in which the court noted that the responsible parties bear the burden of proving the divisibility of harm, and that "CERCLA has been interpreted to impose joint and several liability when the environmental harm is indivisible . . . and to allow for apportionment when two or more persons independently are responsible for a single harm that is divisible." 889 F.2d at 1507 (citing *United States v. Monsanto Co.,* 858 F.2d 160, 171-73 (4th Cir. 1988)). The court went on to state that CERCLA per-

mits actions for contribution among parties who are found jointly and severally liable. 889 F.2d at 1507. Amcast claims that although imposing joint and several liability may result in some defendants paying more than their share of the harm, it would further Congressional intent for "those proven at least partially culpable to bear the cost of the uncertainty." *O'Neil v. Picillo,* 883 F.2d at 179.

Amcast notes that the volume of TCE alone is an insufficient basis upon which to find the harm divisible, citing *United States v. Monsanto,* 858 F.2d. at 172-73. However, more than one contaminant was found to have caused environmental harm in the *Monsanto* case:

> Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences. Under other circumstances proportionate volumes of hazardous substances may well be probative of contributory harm. In this case, however, volume could not establish the effective contribution of each waste generator to the harm at the . . . site.

858 F.2d at 172-173 (footnotes omitted).

Amcast also submits the affidavit of its expert witness, John Mundell, to show that volume alone is an insufficient basis to divide the harm. Mr. Mundell states that the environmental harm is indivisible because "distinct areas indicating separate spill events are not apparent." Further, the soil and groundwater diffuse chemical spills from the source point, making it impossible to determine whether response costs can be attributed to a particular spill.

Amcast claims that to avoid joint and several liability, Detrex must demonstrate a reasonable basis for apportionment in addition to demonstrating the divisibility of the harm. In *United States v. South Carolina Recycling and Disposal, Inc.,* 653 F. Supp. 984 (D.S.C. 1984),

affirmed in part and vacated in part, United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989), the district court determined that the apportionment of costs of responding to environmental harm could not be based solely on the volume of wastes each party generated. In that case, however, unlike the case at hand, there were several types of hazardous wastes that were leaking from containers and commingling, so it was impossible to ascertain the degree of harm caused by each generator.

Although only one contaminant is involved in this action, unlike those cases in which the court expressed concern over commingling of contaminants, the court is not convinced that the harm caused at the EPC site is readily divisible or that there is a reasonable basis for apportionment. In light of Mr. Mundell's affidavit, it appears that the TCE contamination caused by Detrex is not limited to a single area; the earlier summary judgment holdings concerning the "open valve" spill support that conclusion. Further, the TCE spilled during deliverties was less resistent to mobilization through the soil than stillbottoms created during EPC's processing and spilled by EPC employees. The TCE delivered by Detrex was also more concentrated than the TCE in stillbottoms. Therefore, the amount spilled by EPC employees, compared to the amount spilled by Detrex employees, even if it can be determined, may not be a reasonable basis for apportionment of response costs.

In the usual case, equitable apportionment of damages comes into play in a contribution action or claim pursuant to 42 U.S.C. § 9613 after joint and several liability is imposed in a cost recovery action pursuant to 42 U.S.C. § 9607. Detrex asserts, however, that in some CERCLA cases between private parties who are potentially responsible for response costs, it is appropriate to try liability and apportion damages in the same action.

Detrex claims that it would overlook Congressional intent to require it to reimburse Amcast for one hundred percent of its costs. Congress did not intend for minor contributors to fund the entire cleanup of a hazardous waste cite. *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). *See also O'Neil v. Picillo*, 682 F. Supp. at 725-26.

Detrex notes that in *Amoco Oil Co. v. Borden*, 889 F.2d at 672, the court recognized that in a cost recovery suit between private parties, "the action is one for contribution, which is specifically recognized under CERCLA. *See* § 9613(f). Under that provision, a court has considerable latitude in determining each party's equitable share." In that case, however, the court concluded that the environmental harm was indivisible and that the plaintiff/owner of the property shared joint and several liability with the defendant/vendor of the property.

In *Shapiro v. Alexanderson*, 741 F. Supp. 472, 478-79 (S.D.N.Y. 1990), the court determined that the plaintiff who was responsible for environmental harm could recover contribution from other parties for response costs based on their degree of responsibility. The *Shapiro* court did not suggest, however, that the plaintiff's right to recover in the § 9607 action should be delayed while the parties litigated the degree of culpability of each party. In *Environmental Transportation Systems, Inc. v. Ensco, Inc.*, 763 F. Supp. 384 (C.D. Ill. 1991), the court stated:

> Section 9613(f)(1) of CERCLA states that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Thus, it is apparent that a finding that a defendant is a "responsible party" under § 9607(a), as this Court decided ENSCO was . . . is only the initial inquiry. Finding that a defendant is a responsible party and thus strictly liable for contribution under § 9607(a) does not mean that all parties are equally

> responsible and should share costs on a pro rata basis. Rather, such a finding means only that a defendant is *potentially* liable for contribution under CERCLA depending upon the relevant fault of the parties. Once a defendant is found to be a responsible party under § 9607(a), the question shifts to *how much* is that defendant responsible for under the provisions in § 9613(f)(1). Thus, ETS's request for pro rata assessment is rejected as patently inconsistent with the dictates of CERCLA.
>
> Section 9613 contemplates a court's assessing the "relative culpability of each responsible party in determining the proportionate share of costs each must bear." *United States v. Monsanto Co.*, 858 F.2d 160, 170 n.29 (4th Cir. 1988).

Environmental Transportation Systems, Inc. v. Ensco, Inc., 763 F. Supp. at 388 (emphasis in original). Detrex contends that the court should allocate fault in this action without Detrex having to bring a separate contribution action pursuant to § 9613. Amcast claims that equitable apportionment is only applicable in suits for contribution brought pursuant to 42 U.S.C. § 9613(f), and not in this action, noting that Detrex did not assert a contribution claim. Detrex initially denied all liability. Amcast suggests that Detrex should have to abide by the decision it made earlier in this action not to bring a contribution claim.

Amcast cites *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1403 (S.D. Ohio 1991) ("Comparative fault has no place in a 9607 suit, although it certainly may be relevant in a suit for contribution under 9613."). In *O'Neil v. Picillo*, 682 F. Supp. at 725-26, the court determined that apportionment should await an action for contribution.

> I am not insensitive to the possible unfairness involved in holding a few relatively small contributors

> jointly and severally liable for the entire harm. Indeed, there is no question that in CERCLA actions, like other actions involving joint tortfeasors, a court may consider equitable factors to apportion damages and mitigate the effects of joint and several liability. I believe, however, that issues of fairness and equitable apportionment may be more properly addressed in a subsequent contribution action . . . .
>
> This is consistent with CERCLA's key objective of "facilitat[ing] the prompt cleanup of hazardous dumpsites by providing a means of financing both governmental and private responses, and by placing the ultimate financial burden upon those responsible for the danger." *City of Philadelphia v. Stephan Chemical Co.*, 544 F.Supp. 1135, 1142-43 (E.D.Pa. 1982). By delaying thorny considerations of equitable apportionment to a later contribution proceeding, the government is provided immediate funds after the initial liability hearing to take prompt remedial action at the earliest opportunity. In most instances, immediate response to potential disasters caused by seepage and migration can forestall the accrual of considerably higher compensation costs.

(citation omitted). *See also United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).

In *United States v. Kramer*, 757 F. Supp. 397, 412 (D.N.J. 1991), the court noted that a contribution claim may be brought during the pendency of a cost recovery action under 42 U.S.C. § 9607. The court allowed the plaintiff, in that case the federal government, to recover its response costs, regardless of its own potential liability for contribution. *United States v. Kramer*, 757 F. Supp. at 414. The court further reasoned that § 9607 and § 9613 have different purposes.

> Collapsing the distinction between section 107 [42 U.S.C. § 9607] and section 113 [42 U.S.C. § 9613]

ignores the clear language and structure of the statute. Section 107 imposes liability "[n]otwithstanding any other provision or rule of law and subject only to" the defenses set forth in section 107(b). Congress enacted section 113 as a separate section to address contribution.

[I]t would be "anomalous" to permit apportionment of clean-up costs among PRPs in a section 113 action and not to permit apportionment in a section 107 action, but *only if* defendants in a section 107 action could not seek contribution in a section 113 action. But the structure of CERCLA does not preclude consideration of equitable factors, including the liability of a PRP who was (or is) plaintiff in a section 107 action. Rather, CERCLA separates those equitable factors from section 107 and considers them in a section 113 contribution action. . . .

. . . CERCLA was enacted to facilitate cleanup of the tens of thousands of hazardous waste sites in this country. Section 107 permits the Government or a private party to go in, clean up the mess, pay the bill, then collect *all* its costs not inconsistent with the NCP from other responsible parties—even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs—including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding—to apportion costs equitably among all the PRPs. Practically speaking, section 107 permits a PRP, including the Government, to collect all its response costs, even those that that same PRP may be required to pay back to other PRPs as its equitable share in a section 113 proceeding.

What might be called a windfall for a plaintiff PRP in a section 107 action serves as an incentive for private parties to clean up hazardous waste sites,

> to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been their equitable share. If the courts collapse the distinction between a section 107 and 113 proceeding, there will be less incentive for private parties to initiate cleanup, since they would lose the use of that *temporary* windfall gained in a section 107 action.

United States v. Kramer, 757 F. Supp. at 416-17 (emphasis in original) (footnote omitted).

Many of the cases upon which Detrex relies analyzed contribution claims under § 9613, *e.g.*, *Amoco Oil v. Borden, Inc.*, 889 F.2d at 672; *Shapiro v. Alexanderson*, 741 F. Supp. at 479, n.5. In *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), the court applied § 9613 to apportion liability in a § 9607 action, but relied in part on the fact that the party seeking response costs had admitted CERCLA liability. Amcast has made no such admission. Further, the *Dant & Russell* court apportioned liability within the context of a proof of claim in a bankruptcy case.

Detrex cites *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987), in which the plaintiff brought a § 9607 claim and there was no § 9613 counterclaim. In that case, the district court determined that one of the potentially responsible persons was not liable. The court noted that two factors were necessary to impose liability for response costs: CERCLA liability and accountability for disposal of hazardous wastes. The court found that one party was potentially liable under CERCLA, but it was not accountable for disposal of hazardous wastes. The court's decision was based in part on the fact that the party had been released from liability by agreement, and that the party had not disposed of hazardous wastes at the site. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. at 1290-91. In this case, Detrex has not been re-

leased from liability, and Detrex was found to have released TCE at the EPC site.

The court finds the reasoning of *United States v. Kramer*, 757 F. Supp. 397, persuasive. CERCLA's intent is better realized when the apportionment of liability takes place in a claim under § 9613. Section 9607 does not provide for apportionment of liability, and has only a limited number of defenses that do not apply to this action. Therefore, the court concludes that it should not engage in equitable apportionment of the parties' liability in this case. Apportionment will have to await Detrex's filing of an action against § 9613.

Detrex argues that Amcast's earlier settlement with former shareholder defendants should be considered in this court's apportionment. The plaintiffs in this action received $1 million from the former shareholder defendants. In *Comerica Bank-Detroit v. Allen Industries, Inc.*, 769 F. Supp. 1408 (E.D. Mich. 1991), the court applied comparative fault to a CERCLA action settlement. Under § 6 of the Uniform Comparative Fault Act, the plaintiffs' recovery against the non-settling defendants is reduced by the settling defendants' equitable share of fault. Therefore, Detrex claims, before assigning a percentage of fault against Detrex, the court should determine the fault of Detrex, the plaintiffs, and the former shareholders. Detrex has submitted a considerable amount of evidence in this motion and in its previous motion for summary judgment, indicating that the Elkhart Products Corporation employees were responsible for some of the TCE contamination. Many of the areas where contamination occurred were separate from the delivery area, where Detrex's spills occurred.

For the reasons stated above, the court will not apportion liability in this case. Even if apportionment were applied against Amcast, the court would not apportion the liability of the former shareholder defendants, as the order of November 14, 1990 determined that the former

shareholders were not liable. The plaintiffs are entitled to recover their response costs from Detrex.

2. Additional Costs

Amcast claims that it is entitled to recover all of its response costs, including its attorney fees, against Detrex in light of the court's finding of liability on Count I. As of November 22, 1991, Amcast had incurred $1,197,-082.42 in costs which it now seeks to recover. CERCLA provides that private parties may recover "any . . . necessary costs of response incurred . . . consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Amcast claims that its response costs include expenses incurred in storage, confinement, treatment, transport, and disposal of hazardous waste, and monitoring the effectiveness of the response. *Ascon Properties, Inc. v. Mobile Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989), discusses the scope of the term "response cost".

> CERCLA does not define the term "response cost." However, in its definitional section, CERCLA does define "response" as "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). These four terms are defined in the two immediately preceding subsections, §§ 9601(23) & (24). Section 9601(23) makes clear that "removal" includes "the cleanup . . . of released hazardous substances from the environment."

(citation omitted). Amcast's response costs include the cost of investigating the release of a hazardous substance, as well as evaluating and producing methods to address the release. 42 U.S.C. §§ 9601(23), (24); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 695 (9th Cir. 1988).

a. Indirect Costs

Amcast also contends that in addition to recovering the costs directly related to addressing the TCE contamination, it is entitled to recover such indirect costs as labor expenses and office supplies attributable to its response action. Of the $1,197,082.42 of costs incurred as of November 22, 1991, $55,992.28 constituted indirect employee labor costs.

In *T & E Industries, Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 706-07 (D.N.J. 1988), the court found that recoverable costs under 42 U.S.C. § 9601(23) encompassed the value of the time the company president spent in evaluating and mitigating the contamination problem. *See also United States v. R. W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *and United States v. Hardage*, 733 F. Supp. 1424, 1437 (W.D. Okla. 1989) (the government was entitled to recover its indirect response costs).

Detrex contends that employee labor is not a response cost recoverable in a CERCLA action, citing *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1285-96 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3rd Cir. 1988), which noted that Congress chose not to provide recovery for income loss. Detrex also cites *In re Hemingway Transport, Inc.*, 126 Bankr. 656, 663 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992), which stated that CERCLA does not provide recovery for employee time spent in cleanup efforts. The court agrees with Amcast that the indirect costs of employee labor and overhead expenses are recoverable, as such costs are "part and parcel of all costs of the removal action, which are recoverable under CERCLA." *United States v. R. W. Meyer, Inc.*, 889 F.2d at 1503.

b. Attorney Fees

Amcast seeks its attorney fees incurred in connection with its response actions and this cost recovery suit, citing 42 U.S.C. § 9601(25), which states that "[t]he terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." In *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 951 (C.D. Cal. 1990), and in *General Electric Co. v. Litton Business Systems, Inc.*, 715 F. Supp. 949, 959 (W.D. Mo. 1989), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991), the courts determined that attorney fees were recoverable response costs.

Detrex claims that attorney fees are not recoverable response costs. Case law is inconsistent. Several cases have denied attorney fees in private CERCLA actions. *State of New York v. SCA Services, Inc.*, 754 F. Supp. 995, 1000 (S.D.N.Y. 1991), stated that the prevailing rule is that attorneys fees are not recoverable in private CERCLA actions and that if Congress had intended to allow recovery of attorney fees it would have so provided *See also Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62 (D.N.H. 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989).

In *Pease & Curren Refining, Inc v. Spectrolab, Inc.*, 744 F. Supp. at 950-51, the court concluded that allowing attorney fees as recoverable response costs would further CERCLA's intent to provide prompt and effective cleanup of waste disposal sites and insure that those responsible for the release of hazardous substances bore the cost of response, citing *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986). *See also General Electric Co. v. Litton Automation Systems*, 920 F.2d at 1422. In allowing recovery of attorney fees and litigation expenses in a cost recovery action, the court

in *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991), stated:

> By providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. . . . The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs. Thus, to the extent that any litigation costs incurred by the plaintiffs fall within the meaning of the "necessary costs' authorized under § 9607(a)(4)(B), plaintiffs are entitled to recover such costs.

See also Key Tronic Corp. v. United States, 766 F. Supp. 865, 871-72 (E.D. Wash. 1991). This court finds the *Bolin* court's position persuasive and well-taken. It would defeat the express purpose of CERCLA to require plaintiffs seeking to recover response costs to incur attorney fees in connection with their actions to recover response costs. Enforcement activities recoverable under § 9607 necessarily include attorney fees, and, therefore, Amcast may recover its attorney fees in this action.

C. Declaratory Relief

Amcast requests a declaratory judgment pursuant to 42 U.S.C. § 9613(g)(2) that Detrex is liable for any future costs it incurs in cleaning up the TCE contamination, claiming that such a judgment is appropriate as to future costs because the court cannot award costs until they are incurred. *United States v. Hardage*, 733 F. Supp. at 1439; *Williams v. Allied Automotive Autolite Division*, 704 F. Supp. 782, 784 (N.D. Ohio 1988); *Rockwell International Corp. v. I U International Corp.*, 702 F. Supp. 1384, 1388 (N.D. Ill. 1988).

Detrex claims that Amcast is not entitled to declaratory relief as to the plaintiffs' future response costs because a trial is necessary to determine each party's liability. CERCLA provides for a declaratory judgment on liability for response costs in § 9607 actions. 42 U.S.C. § 9613 (g)(2). In *In re Dant & Russell, Inc.*, 951 F.2d at 249-50, the court explained the propriety of declaratory relief as to future response costs in a CERCLA action:

> [Sections 9607 and 9613(g)(2)] envision that, before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard. They can then go to court and obtain reimbursement for their initial outlays, as well as a declaration that the responsible party will have continuing liability for the cost of finishing the job.
>
> This system strikes a balance between a number of considerations. By requiring a plaintiff to take some positive action before coming to court, CERCLA insures that the dispute will be ripe for judicial review. On the other hand, by not requiring plaintiffs to perform full cleanup before coming to court, and by expressly providing for declaratory judgments, CERCLA substantially reduces the risk involved in performing the cleanup. This encourages private response.

(citation omitted). *See also United States v. Kramer*, 757 F. Supp. at 412.

The court agrees, and concludes that the plaintiffs are entitled to a declaratory judgment as to their future response costs.

III. CONCLUSION

For the foregoing reasons, the court hereby DENIES the defendants' motion to amend, and GRANTS the plaintiffs' motion for partial summary judgment. In light of the plaintiffs' representation that they will dismiss their

common law negligence claim in Count VI and their claim for punitive damages, it appears that no issues remain in this case, and the clerk is directed to enter judgment in accordance with this order and the order of November 18, 1991.

Judgment shall be entered for the plaintiffs on Counts I, II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, plus attorneys fees, litigation expenses and prejudgment interest in sums to be determined hereafter pursuant to District Rule 43. Interest shall accrue on the amount of the judgment as allowed by law. Declaratory judgment shall be entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its successors or assigns are liable include attorneys fees, litigation and expenses and prejudgment interest.

SO ORDERED.

ENTERED: April 9, 1992

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
United States District Court
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620 (RLM)

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

vs.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

This is a CERCLA case in which the plaintiff seeks to recover response costs against a supplier of a hazardous substance, whose drivers are claimed to have spilled the substances during deliveries. The cause comes before the court on the motion by defendant Detrex Corporation's for summary judgment, the plaintiffs' motion for partial summary judgment, and Detrex's first and second motions to strike portions of the documentary evidence submitted in support of the plaintiffs' partial summary judgment motion. The parties' briefing, which consisted as much of disparagement of the others' arguments as positive arguments of their own, began on August 19 and appears to have come to a close on November 8.

The court acknowledges the plaintiffs' request for oral argument on their motion for partial summary judgment and on the first motion to strike. However, the parties' thorough memoranda sufficiently aid the court that oral

argument will not be necessary, particularly in recognition of the proximity of the December 2 trial date.

I. FACTS

Plaintiff Elkhart Products Corporation ("EPC") operates a manufacturing plant in Elkhart, Indiana. EPC is a wholly owned subsidiary of plaintiff Amcast Industrial Corporation ("Amcast"). Detrex manufactures chemicals for industrial uses, including a solvent known as trichloroethylene ("TCE"), a hazardous substance as defined in 42 U.S.C. § 9601(14). TCE is a mutagen and a suspected carcinogen, and human exposure to this substance may cause eye and skin irritation, headaches, heart disease, and liver damage.

Detrex marketed its chemicals to Indiana customers through its Gold Shield Solvents Division in Indianapolis. Detrex sold TCE to EPC between 1978 and 1986, making approximately thirty-four deliveries to the Elkhart site. Detrex was EPC's sole supplier of TCE during those years. Detrex employed five drivers to deliver the solvent. However, for fifteen of the thirty-four deliveries, Detrex used the services of an independent common carrier, Transport Services Company ("Transport").

The plaintiffs contend that TCE was spilled when it was delivered by Detrex or Transport drivers, contaminating the soil and groundwater. The plaintiffs assert that the drivers spilled two to five gallons of TCE with each delivery, and twice spilled greater quantities. One occasion involved an overfilling of EPC's tank, resulting in a 200 to 300 gallon spill that destroyed the asphalt pavement surrounding the tank. The other incident involved the driver's failure to close the valve of his truck, causing a two inch stream of TCE to be discharged from the truck as it left the EPC site.

EPC learned of the TCE groundwater contamination in the 1980s, following an investigation of a complaint

that TCE was traveling from the groundwater beneath EPC's plant and polluting the groundwater beneath Miles Laboratories, a pharmaceutical manufacturer located across the street.

The plaintiffs further allege that they expended more than $1 million to monitor the release of TCE into the environment, take short term action to eliminate risks, and design and install a permanent remedy. EPC claimed that its remedial action will cost nearly $1.5 million and that it sustained $1 million in property damage.

In a letter dated August 27, 1986, EPC's president demanded that Detrex reimburse EPC for the cost of the remedial measures. Detrex did not reimburse EPC. Amcast and EPC brought this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The plaintiffs also sought common law tort and contractual remedies.

II. SUMMARY JUDGMENT STANDARD

A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Certain Underwriters of Lloyd's v. General Accident Ins. Co. of America,* 909 F.2d 228, 231 (7th Cir. 1990). If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3186 (1990); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Sims v. Mulcahy,* 902 F.2d 524, 540 (7th Cir.), *cert. denied* 111 S.Ct. 249 (1990). If he fails to do so, summary judgment is proper. *Fitzpatrick v. Catholic Bishop of Chicago,* 916 F.2d 1254

1256 (7th Cir. 1990); *Tatalovich v. City of Superior*, 904 F.2d 1135, 1142 (7th Cir. 1990). A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. *Harbor House Condominium Ass'n v. Massachusetts Bay Ins. Co.*, 915 F.2d 316, 320 (7th Cir. 1990); *Hines v. British Steel Corp.*, 907 F.2d 726, 728 (7th Cir. 1990). Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991).

The parties cannot rest on mere allegations in the pleadings, *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 428 (7th Cir. 1991); *McCarthy v. Kemper Life Ins. Companies*, 924 F.2d 683, 687 (7th Cir. 1991), or upon conclusory allegations in affidavits. *Mestayer v. Wisconsin Physicians Service Ins. Corp.*, 905 F.2d 1077, 1079 (7th Cir. 1990). The court must construe the facts as favorably to the non-moving party as the record will permit, *Brennan v. Daley*, 929 F.2d 346, 348 (7th Cir. 1991); *Soldal v. County of Cook*, 923 F.2d 1241, 1245 (7th Cir. 1991), and draw any permissible inferences from the materials before it in favor of the non-moving party, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Illinois Bell Telephone Co. v. Hanes and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990), as long as the inferences are reasonable. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law. *Johnson v. Pelker*, 891 F.2d 136, 138 (7th Cir. 1989).

The court will address the parties' motions for summary judgment with these standards in mind.

III. THE MOTIONS TO STRIKE

The plaintiffs and Detrex each seek summary judgment on count I, which alleges that Detrex and its drivers are strictly liable for the plaintiff's response costs under 42 U.S.C. § 9607(a)(1) because Detrex is the owner or operator of a facility from which there was a release of hazardous substances. Detrex also moves for summary judgment in its favor as to Counts II, IV, V, VI, VII, VIII, IX, and XIII and the request for punitive damages in the complaint. Count II alleges that Detrex is strictly liable under 42 U.S.C. § 9607(a)(3) for response costs because Detrex arranged for the disposal of a hazardous substance which caused contamination at the site.

Count IV of the complaint alleges that an implied term existed in the contract betwen Detrex and the plaintiffs that required Detrex to deliver TCE without spillage and without causing environmental damage; the plaintiffs claim that Detrex breached this implied term. Count V asserts that Detrex committed a trespass when it spilled TCE at the site. Count VI alleges negligence by the drivers who delivered TCE, and Count VII alleges that Detrex negligently hired and trained its delivery drivers. Count VIII asserts Detrex is strictly liable for damages because its delivery of TCE constituted an "abnormally dangerous activity." [1] Count IX asserted a nuisance claim and Count XIII asserted an indemnity claim, but the plaintiffs have withdrawn those counts of the complaint.

A. Evidence of the Spills

The proposition that Detrex caused TCE to be spilled is common to each of the counts. If there were no spills, Detrex engaged in no "release" (Count I), engaged in no "disposal" (Count II), breached no implied "anti-spillage"

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[1] The plaintiffs claimed in Count VIII that Detrex was engaged in an "ultrahazardous activity". However, the parties now agree that the modern term is "abnormally dangerous activity".

provision in the contract (Count IV), did not exceed the scope of its invitation so as to commit a trespass (Count V), and engaged in no abnormally dangerous activity (Count VIII). If there were no spills, the plaintiff suffered no damages due to the negligence of Detrex's drivers (Count VI) or Detrex's negligence in training or retaining those drivers (Count VII). Detrex argues that the plaintiffs have no admissible evidence to prove any TCE spillage by Detrex, and has moved to strike several portions of depositions that the plaintiffs seek to use as proof.

Detrex argues that the court must exclude, on hearsay grounds, *see* Fed. Rr. Ev. 802, the portions of the testimony of Clifton Cartwright, Henry Copenhaver, Gary Emerson, John Graber, Ed Hosea, Richard Mann, Robert Patterson, Dennis Selner, David Smith, and Robert Todd in which the deponents relate that they heard about TCE spills from others. Detrex cites *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1991), in which the Seventh Circuit noted that affidavits offered in opposition to a summary judgment motion were not based on personal knowledge. The court stated that Fed. R. Civ. P. 56(e) incorporates Fed. R. Ev. 602, and that evidence offered on summary judgment must be based on the affiant's or deponent's observation or other firsthand experience. 924 F.2d at 659. See also *Price v. Rochford*, No. 90-1179, slip op. at 7 (7th Cir., Nov. 8, 1991) ("The court believed the articles to be inadmissible. . . . If so, they fail to meet the requirements of Rule 56 (e)").

The plaintiffs respond that the court should give some leeway as to evidence submitted at the summary judgment stage because of the preliminary nature of the proceeding, citing *McFeely v. United States*, 700 F. Supp. 414, 418, n.1 (S.D. Ind. 1988); and *Reed v. Ford Motor Co.*, 679 F. Supp. 873 (S.D. Ind. 1988). Although each of those cases contain the broad language on which the plaintiffs rely, 700 S. Supp. at 418 n.1 ("Some leeway is given at

summary judgment because of the preliminary nature of the proceedings"); 679 F. Supp. at 875 ("the court will not exclude evidence at this stage on grounds of hearsay, irrelevance, or undue prejudice"), the cases' holdings do not support an overly broad reading of Fed. R. Civ. P. 56(e).

The *McFeely* court, which appears to have raised the issue *sua sponte*, considered deposition testimony under Fed. R. Civ. P. 804(b)(1) despite the absence of a showing of the deponent's unavailability, but described its decision as "generous", and noted that, "Hearsay evidence that does not qualify under any of the hearsay exceptions may not be considered by the courts in ruling on a motion for summary judgment." 700 F. Supp. at 417-18. The *Reed* court considered unauthenticated documents attached to an attorney's affidavit, with the understanding that the documents would be the subjects of trial stipulations. These cases deal with unique circumstances. Together, they support the proposition that doubts as to admissibility should be resolved in favor of admissibility at the summary judgment stage, but they do not support a proposition that a summary judgment court may entirely disregard evidentiary rules governing admissibility at trial.

Accordingly, the court turns to the deposition portions that Detrex challenges. By way of introduction, the plaintiffs contend that the spills fall into three categories:

—*the delivery spills*: small quantities of a gallon or more routinely spilled during all or most deliveries of TCE;

—*the overfill spill*: an incident in which a storage tank was overfilled, causing 200 to 300 gallons of TCE to spill and destroy asphalt; and

—*the open-valve spill*: an incident in which a truck left the storage tank with the truck's valve open, spilling twenty-five to fifty gallons of TCE.

1. Clifton Cartwright

Mr. Cartwright is EPC's plant engineer. In his deposition, he testified that Gary Emerson and Bob Todd told him of each of the spillage incidents, although Bob Todd had learned of the overflow spill from another person. Mr. Cartwright investigated the spills, talking to everybody he could think of. Detrex argues that since Mr. Cartwright knows no more than what he was told, his deposition testimony is inadmissible. Fed. R. Ev. 602, 802.

The plaintiffs respond with several arguments. First, they argue that the Cartwright testimony is not hearsay because it is not offered to prove the truth of the matter asserted. Mr. Cartwright's testimony as to the purpose of his investigation following a spill that damaged the asphalt, the plaintiffs contend, is offered to prove that the plaintiffs conducted an investigation pursuant to 40 C.F.R. § 300.71(a)(2)(ii)(A) (1988), an essential element of the plaintiffs' claim in Count I. They also seem to argue that Mr. Cartwright's testimony is admissible under Fed. R. Ev. 803(24). They argue that his testimony is material and probative, and that its trustworthiness is not seriously contested.

The court agrees that Mr. Cartwright's testimony, if limited to showing the conduct of the investigation, is not hearsay. See Fed. R. Ev. 801(c); *United States v. Blandina,* 895 F.2d 293, 300-301 (7th Cir. 1989). If so limited, his deposition testimony is not proof of any spill. Spills may be proven only if the residual exception established by Rule 803(24) applies.[2]

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[2] Fed. R. Ev. 803(24) provides:

> A statement not specifically covered by any of the [other] exceptions [to the hearsay rule] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent

Admissibility under the residual exception established by Rule 803(24) requires that "the statement must be sufficiently trustworthy, material, probative, in the interests of justice, and given to opposing parties with the proper notice." *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 (7th Cir.), *cert denied*, 110 S.Ct. 366 (1989). At this point, the court affords the plaintiffs the leeway discussed in *McFeely* and *Reed*: the record contains no suggestion that Detrex was given notice that the plaintiffs intended reliance on Rule 803(24), *see United States v. Wilkus*, 875 F.2d 649, 655 (7th Cir.) *cert. denied*, 110 S.Ct. 184 (1989), but at the summary judgment stage, the court will consider the statements' admissibility under the remaining tests.

District courts have considerable discretion in applying the residual exception. *United States v. Mokol*, 939 F.2d 436, 438 (7th Cir. 1991); *United States v. Doerr*, 886 F.2d 944, 954 (7th Cir. 1989); *United States v. York*, 852 F.2d 221, 224 (7th Cir. 1988); *United States v. Howard*, 774 F.2d 838, 845 (7th Cir. 1985). The residual exception is "intended to be used rarely, and only in exceptional circumstances." *United States v. Moore*, 791 F.2d 566, 573 (7th Cir. 1986); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979).

Among the factors considered in determining whether to apply the residual exception are the declarant's disinterest, *United States v. Jackson*, 780 F.2d 1305, 1316 (7th Cir. 1986); *United States v. Howard*, 774 F.2d at 845, the declarant's motivation to lie, *United States v. York*, 852 F.2d at 225, whether the statement was made under oath, *United States v. Hooks*, 848 F.2d 785, 797 (7th Cir. 1988); *United States v. Guinan*, 836 F.2d 350, 355 (7th Cir.), *cert. denied*, 487 U.S. 1218 (1988); *United States v. Boulahanis*, 677 F.2d 586, 588 (7th

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can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Cir.), *cert. denied* 459 U.S. 1016 (1982), the declarant's probable motivation in making the statement, *United States v. Marshall*, 856 F.2d 896, 901-902 (7th Cir. 1988); *United States v. Guinan*, 836 F.2d at 355; *Cook v. Hoppin*, 783 F.2d 684, 691 (7th Cir. 1986), the extent of the declarant's personal knowledge of the events recounted in the statement, *United States v. Doerr*, 886 F.2d at 956; *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d at 576; *United States v. Snyder*, 872 F.2d 1351, 1356 (7th Cir. 1989), the probable accuracy of the witness's recounting of the declarant's statement, *United States v. Hooks*, 848 F.2d at 797, a testifying witness's knowledge of the statement's contents, *United States v. Peters*, 791 F.2d 1270, 1293 (7th Cir.), *cert. denied sub nom, Odonen v. United States*, 479 U.S. 847 (1986), the declarant's age, *United States v. York*, 852 F.2d at 225, the declarant's character for truthfulness and honesty, *United States v. Snyder*, 872 F.2d at 1355, the frequency with which the declarant made similar statements, *United States v. Vretta*, 790 F.2d 651, 659 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986); *United States v. Howard*, 774 F.2d at 846, whether the declarant recanted the statement, *United States v. Moore*, 936 F.2d 1508, 1517 (7th Cir. 1991), the statement's temporal proximity to the event related, *United States v. Vretta*, 790 F.2d at 659, and the existence of sufficient corroborative evidence, *United States v. York*, 852 F.2d at 225; *accord, United States v. Mokol*, 939 F.2d at 440 ("where the testimony is critical to the case, the trial court may require a high degree of corroboration").

The court also must consider whether more probative, admissible evidence exists, *United States v. Powell*, 894 F.2d 895, 901 n.5 (7th Cir.) *cert. denied*, 110 S.Ct. 2189 (1990); *United States v. Wilkus*, 875 F.2d 649, 655 (7th Cir.) *cert. denied*, 110 S.Ct. 184 (1989); *United States v. Vretta*, 790 F.2d at 658-659; *Huff v. White Motor Corp.*, 609 F.2d at 295, although sheer need alone

does not justify admission. *United States v. Snyder,* 872 F.2d at 1355.

The court cannot find that Mr. Cartwright's testimony is admissible under Rule 803(24) to prove the truth of what he was told about the spills. The cases discussed above indicate that with very rare exceptions, the declarants' identities and the basis of the declarants' knowledge must be known. Without such knowledge, the court cannot evaluate the declarants' disinterest, motivation, personal knowledge, general truthfulness, or consistent repetition. For example, in *Cook v. Hoppin,* 783 F.2d at 691, the court found error in admission of statements under Rule 803(24) when the declarants' identities were unknown, and the declarants themselves may have based their statements on hearsay. Under such circumstances, the court held, an analysis cannot even begin as to whether the statements have the requisite circumstantial guarantees of trustworthiness.

Mr. Cartwright was asked the names of the persons with whom he spoke, and he provided six names. He was unable, however, to recall what he was told by each of them. Accordingly, the analysis required by Rule 803(24) cannot be satisfied.

Mr. Cartwright's deposition testimony may be considered, but only insofar as it is offered to establish that the plaintiffs engaged in an investigation of the spills. It is inadmissible, and so may not be considered on summary judgment, to establish that spills occurred.

2. Gary Emerson

Mr. Emerson testified to having seen TCE end up on the ground when trucks filled the tanks on ten to fifteen occasions from the "late seventies up through early eighties", although he could not provide exact dates. The earliest such occasion was about 1978. Detrex moves to strike Mr. Emerson's testimony as irrelevant because he

did not identify the delivery company, so the spills cannot be attributed to Detrex. Detrex argues that this uncertainty causes the potential for unfair prejudice to substantially outweigh the testimony's probative value. The court disagrees.

The record indicates that Detrex was the plaintiffs' sole supplier of TCE from 1978 to 1986, the years encompassing Mr. Emerson's observations. That Detrex employed Transport drivers on fifteen deliveries does not render Mr. Emerson's testimony unduly prejudicial, because Detrex may be liable under 42 U.S.C. § 9607(a)(3) for arranging transport for disposal of a hazardous substance.

Detrex's motion to strike Mr. Emerson's deposition testimony must be denied.

3. John Graber

Mr. Graber testified that in the early to mid-1980s, he "heard about a spill out in the back" "from different people around the plant here, talking about it." He heard that somebody fell asleep while filling the tank, causing an overflow. Detrex objects on hearsay grounds.

The plaintiffs first respond that the Graber testimony is offered only to corroborate other evidence of the overflow spill. If the testimony is offered to prove the fact of the spill, however, it is hearsay. The plaintiffs then argue that the evidence is admissible to establish the time of the overflow spill, placing it in the years in which Detrex was the plaintiffs' sole supplier of TCE. The plaintiffs offer no authority for this use of the evidence. Finally, the plaintiffs argue that Mr. Graber's testimony is admissible under Rule 803(24). Mr. Graber's testimony provides no basis for evaluating the declarant, however; the sources of his information are completely unidentified. Accordingly, for the reasons set forth in the discussion with respect to Mr. Cartwright's testimony, Rule 803(24) provides no vehicle for admissibility.

Detrex's motion to strike the deposition testimony of Mr. Graber must be granted.

4. Ed Hosea

Mr. Hosea testified to the overflow spill that destroyed the asphalt. He testified that he was not at the plant on the day it occurred, but was told when he got back. He was told by "somebody" to look at the asphalt, and "they said" a Detrex driver had failed to hook his equipment up properly. He was unable to recall the date.

Detrex moves to strike on hearsay grounds. The plaintiffs respond with the first and third arguments raised with respect to Mr. Graber's testimony. For the reasons discussed above, those arguments must fail.

Detrex's motion to strike Mr. Hosea's testimony must be granted.

5. Richard Mann

Mr. Mann testified to having heard of the overflow spill and to having seen delivery spills, although he could not specify the time period in which he observed the delivery spills. Detrex moves to strike the testimony concerning the overflow spill as hearsay, and moves to strike the testimony concerning the delivery spills under Rule 403.

Mr. Mann's testimony about the delivery spills has substantial probative value that outweighs any risk of unfair prejudice. His testimony that the time period about which he spoke was before the second TCE storage tank was installed, an event that occurred after Detrex became sole supplier, makes his observations relevant, and the risk of unfair prejudice is negligible at the summary judgment stage.

With respect to the testimony about the overflow spill, the plaintiffs again seek refuge in Rule 803(24). Unlike most of the other declarants at issue in the motion to strike, Mr. Mann identified the source of his information:

he said he heard about spill from Mr. Todd and night watchman Dewel Abner. As is discussed below, Mr. Todd says his information came in part from Mr. Mann; testimony that seeks its requisite foundation of personal knowledge from declarants who each disclaim personal knowledge cannot be said to bear sufficient circumstantial guarantees of trustworthiness.

The case for admissibility is stronger to the extent Mr. Mann was relating what he learned from Dewel Abner, who has not (in this record) denied personal knowledge. Mr. Mann's attribution is, however, the only mention of Mr. Abner that the court has found in the record before it. The record contains nothing to suggest a basis for a determination of Mr. Abner's character for truthfulness, the consistency of his statements, or even the basis of his knowledge. Accordingly, the court must conclude that Mr. Mann's testimony about the overfill spill is inadmissible hearsay.

The motion to strike Mr. Mann's testimony about the delivery spills should be denied. The motion to strike Mr. Mann's testimony about the overfill spills must be granted.

6. Robert Todd

Mr. Todd was EPC's plant engineer. He testified to having observed the open-valve spill. He also testified to having been told of the overflow spill by John Graber, Dick Mann (and perhaps others), having seen the overflow spill's aftermath on the asphalt parking lot, and having suggested that the repair bill be sent to Detrex. Detrex objects to Mr. Todd's testimony about what caused the damage to the asphalt.

The plaintiffs respond by noting that shortly after the overflow spill, Mr. Todd wrote a memo, now lost, about the incident. The memo was based on information he had received from an EPC employee with first-hand knowledge of the incident. The memo, the plaintiffs argue, satisfied all requirements for a record of regularly

conducted activity, and hence would be admissible under Fed. R. Ev. 803(6); accordingly, they conclude, Mr. Todd should be able to testify to the memo's contents in light of its unavailability. See Fed. R. Ev. 1004.

The court's research has disclosed no case that addresses the admissibility of verbal recollection of a lost business record prepared eleven years earlier, and the parties' research presumably has been equally fruitless. The cases cited by the plaintiffs relate to lost written instruments upon which suit was based, rather than written accounts of allegedly negligent acts. Assuming that Mr. Todd would be allowed to testify to the content of the lost memorandum, however, he did not do so. The deposition contains no suggestion that he was recounting, or was asked to recount, the content of the lost memorandum; he was testifying to his recollection of what others told him. That he may have made a contemporaneous memorandum does not render his recollection of what others told him admissible over a hearsay objection.

The plaintiffs also argue that Mr. Todd's testimony is admissible under Rule 803(24). They point to the circumstantial guarantees of trustworthiness present when one reports to his superiors, citing *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785, 818 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984). Mr. Todd, however, testified that his information about the overflow spill came from John Graber and Dick Mann. Mr. Mann, however, testified that he learned of the overflow spill from Mr. Todd, and Mr. Graber testified that he learned of the overflow spill from unidentified persons. Given that both identified sources of Mr. Todd's information disclaim personal knowledge of the overflow spill (although Mr. Todd also may have acquired information from others not identified, whose personal knowledge cannot be evaluated), the court cannot find that Mr. Todd's testimony bears sufficient cir-

cumstantial guarantees of trustworthiness for admissibility under Rule 803(24).

Detrex also moves to strike the portions of Mr. Todd's testimony in which he stated that the damage to the asphalt was caused by TCE. The court is not willing to hold that Mr. Todd lacks sufficient experience and training to testify that the damage he personally observed was consistent with a spillage of TCE. Even accepting the testimony to that extent, however, Mr. Todd has demonstrated no basis, other than inadmissible hearsay, for any opinion that the damage was caused by an overfill spill or by Detrex's negligence.

The motion to strike Mr. Todd's testimony concerning the overfill spill must be granted.

7. Henry Copenhaver

Mr. Copenhaver, an EPC employee, testified in his deposition that Bob Todd had told him "that there was a spill and that we should contact whoever was involved in it and make them aware." He does not recall speaking to any supplier, although he identified the purchase orders for asphalt repair. Detrex moves to strike Mr. Copenhaver's testimony about the conversation with Mr. Todd.

The plaintiffs argue that Mr. Copenhaver's testimony is admissible to show notice to Detrex and is admissible under Rule 803(24). As discussed with respect to the Cartwright testimony, if the testimony is offered only to show notice, it is not hearsay. Mr. Copenhaver's testimony does not, however, show notice to Detrex; Mr. Copenhaver denied any recollection of notifying Detrex or any other supplier. The plaintiffs point to the testimony of Stan Miles of Detrex, who testified that Mr. Copenhaver called him and said there had been a spill and that Mr. Copenhaver would check into it. The Miles testimony is probative of notice, but the Copenhaver testimony is not.

The Copenhaver testimony is not admissible under Rule 803(24). Mr. Copenhaver knows no more about the overfill spill than Mr. Todd told him, and Mr. Todd's knowledge cannot be traced to anyone with personal knowledge of the overfill spill.

Accordingly, Detrex's motion to strike the Copenhaver testimony must be granted.

8. Robert Peterson

Mr. Peterson described the overflow spill. He disclaimed any personal knowledge of the spill; he heard about it from Mr. Todd. He also testified that when he was presented with the invoice to replace the asphalt parking lot, someone (he does not recall who) told him of the spill, and he relayed the information to Detrex. Detrex moves to strike on hearsay grounds.

The plaintiffs make several arguments in support of admissibility. First, thye note that evidence introduced to show why a person acted as he did is not hearsay, citing *United States v. Amahia*, 825 F.2d 177, 181 (8th Cir. 1987). This argument is correct, although it would preclude the court from viewing Mr. Peterson's testimony as substantive proof of the overflow spill. See *United States v. Martinez*, 939 F.2d 412, 415 (7th Cir. 1991).

The plaintiffs also argue that Mr. Peterson's testimony falls within Rule 803(24). Everything Mr. Peterson related about the overflow spill, however, came from Mr. Todd who, in turn, testified that his information came entirely from persons who disclaim personal knowledge of the overflow spill or unidentified persons. Notwithstanding the presence of some guarantees of trustworthiness inherent in a process of reporting within a business, the evidence nonetheless amounts to a totem pole of hearsay of undetermined length: Mr. Peterson relates what he was told by Mr. Todd, who relates what he was told by Messrs. Graber and Mann, who related what

they were told by others, whose personal knowledge is uncertain.

Finally, the plaintiffs argue that Mr. Peterson's testimony is against his pecuniary interest, Fed. R. Ev. 804 (b)(3), noting that Mr. Peterson was a defendant in the plaintiffs' parallel state court action. While such an argument might [3] render Mr. Peterson's statements admissible, it would not render admissible statements other persons made to Mr. Peterson; Detrex's motion to strike is addressed to the statements of others. See Fed. R. Ev. 805.

9. Dennis Selner

Mr. Selner testified to having seen the damage to the asphalt after the overfill spill. What he knows about the spill is what Mr. Todd told him. Detrex moves to strike his testimony about the cause of the spill on hearsay grounds. Again, the plaintiffs argue for admissibility under Rule 803(24). As discussed above, Mr. Todd (Mr. Selner's source of information) had no personal knowledge about the overfill spill, and acquired his information either from unidentified persons or from persons who also lacked personal knowledge. For the reasons discussed above, the court cannot find Mr. Selner's challenged tetsimony to be admissible under Rule 803 (24).

The motion to strike Mr. Selner's testimony about the overfill spill must be granted.

10. David Smith

Mr. Smith testified to what Mr. Todd told him about the overfill and open-valve spills, to having seen the asphalt the day following the overfill spill, and to Mr. Todd having told him about Mr. Copenhaver's contact with Detrex about the incident. Detrex moves to strike

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[3] The plaintiffs would have to provide a further explanation of why Mr. Peterson's challenged testimony was against his pecuniary interest, a point not immediately apparent from the deposition excerpt.

these portions of Mr. Smith's deposition testimony as hearsay.

The plaintiffs argue that Mr. Smith's testimony is admissible under Rule 803(24). They stress the consistency of Mr. Smith's testimony about the overfill spill with the accounts of others. Although consistency may be pertinent to determining admissibility under Rule 803(24), it is not determinative; repetition does not render hearsay admissible. More persuasive is the absence of any person shown to have personal knowledge of the overfill spill. If, as decided above, Mr. Todd cannot testify to what he was told about the overflow spill, Mr. Smith cannot testify to what Mr. Todd told him.

Because the summary judgment record already contains Mr. Todd's deposition testimony (based on personal knowledge) about the open valve spill and Mr. Miles's testimony about the conversation with Mr. Copenhaver, the motion to strike the remaining challenged portions of Mr. Smith's testimony is moot.

The motion to strike Mr. Smith's testimony must be granted insofar as it relates to the overfill spill.

11. Conclusion

Following ruling on the pertinent portions of the motion to strike, the court agrees with Detrex in part. There is no evidence in compliance with Federal Rule of Civil Procedure 56(e) with respect to the overfill spill. To the extent the plaintiffs' claims arise from that allegation, Detrex is entitled to summary judgment. There is, however, evidence of compliance with Federal Rule of Civil Procedure 56(e) with respect to the delivery spills and the open-valve spill; to the extent the plaintiffs' claims arise from those allegations, the claims survive. CERCLA imposes no quantitative requirement on a release. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 735 F. Supp. 358, 361-362 (W.D. Wash. 1990).

B. Second Motion to Strike

Detrex's second motion to strike addresses a document the plaintiffs submitted as an attachment to their reply to Detrex's response to the plaintiffs' partial summary judgment motion. Because that attachment neither strengthens the plaintiffs' case with respect to the overfill spill nor weakens the case with respect to the delivery spills and the open-valve spill, the issue is moot. The court is compelled to add, however, that Detrex's argument that the submission offends the district rules on summary judgment motions does not impress the court.

District Rule 13 requires one opposing a summary judgment to identify the fact issues the opponent believes are in genuine dispute. Detrex has not done so, despite repeated reminder by the plaintiffs. As the plaintiffs note, the failure to comply with such a rule may constitute grounds for granting the summary judgment motion. See, e.g., *Appley v. West,* 929 F.2d 1176 (7th Cir. 1991). The court has declined to follow that course in this case because Detrex has opposed the plaintiffs' motion vigorously, relying on the inadmissibility and absence of the plaintiffs' proof. Detrex's papers adequately identify those issues pertinent to summary judgment. The court believes it inappropriate, however, for a party who has ignored the rules to move to strike an adversary's submissions for failure to comply with the rules.

C. Evidence of Compliance with NCP

Detrex also moves to strike an exhibit to the plaintiffs' summary judgment motion and the deposition testimony of John Mundell.

Exhibit 1 to the plaintiffs' memorandum in support of summary judgment consists of a report prepared by ATEC Associates, Inc., entitled *Review of Investigation and Remedial Activity Consistency with the National Oil and Hazardous Substances Pollution Contingency Plan.* Exhibit 13 is a portion of the deposition testimony of

John Mundell, an ATEC employee. Plaintiffs' counsel contacted Mr. Mundell to review the documents and activities associated with the EPC site and determine whether the plaintiffs' investigative and remedial activities complied with the NCP. The report reviews the investigations of soil and groundwater contamination and remediation efforts at the EPC site and concludes that these efforts complied with the NCP.

Detrex asserts that the ATEC Report and Mr. Mundell's testimony are inadmissible expert opinions on a question of law. The plaintiffs argue that their consistency with the National Contingency Plan is a question of fact, and expert opinion is, therefore, appropriate.

Both parties cite *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir. 1991), in which the court determined that consistency with the NCP is an element of the CERCLA plaintiff's *prima facie* case. However, as the plaintiffs note, the court's determination on consistency with the NCP was made after an extensive factual record had been established. This point was made by *Carlyle Piermont Corp. v. Federal Paper Board Co.*, 742 F. Supp. 814, 819 (S.D.N.Y. 1990), in which the court concluded that genuine issues of fact existed as to whether the plaintiff's action was removal or remedial, and whether the plaintiff complied with the appropriate NCP requirements. *See also Amland Properties Corp. v. Aluminum Co. of America*, 711 F.Supp. 784, 794 (D.N.J. 1989).

The plaintiffs also cite *United States v. Mottolo*, 695 F. Supp. 615, 630 (D.N.H. 1988), in which the court stated that consistency with the NCP "is a triable issue of fact which goes to the amount, not the fact, of defendants' liability."

Detrex cites *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*, 748 F. Supp. 373, 386 (E.D.N.C. 1990), in which the court determined that the classification of an action as removal or remedial was an issue of

law not suited for expert testimony. The court noted a factual dispute as to the cost effectiveness of the response action, which is one factor in compliance with the NCP. However, as to the other factors, the court found that the plaintiff did not substantially comply with the NCP requirements and summary judgment was appropriate.

The plaintiffs argue alternatively that if the determination of consistency with the NCP is a question of law, it still is appropriate to admit expert opinion testimony on this issue. The regulations are complex, and expert testimony would aid the court.

The plaintiffs also contend that even if the expert opinion is inadmissible as to consistency with the NCP, it is admissible as a summary of facts, citing *United States v. Schafer*, 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). *Schafer* was a prosecution for tax evasion in which an IRS agent testified as an expert, giving his opinion as to the proper computation of the defendant's tax liability. The IRS agent prepared two charts summarizing the evidence presented at trial, and stated that all his figures were based upon direct testimony or documents admitted into evidence. The Fifth Circuit determined that a solid evidentiary foundation had been laid for the opinion, which was based on facts in evidence and presented to a properly instructed jury. 580 F.2d at 778.

Obvious problems arise in viewing the ATEC report as a summary at this stage of the litigation. The opinions do not rely on documents admited into evidence; nothing at all has been admitted into evidence. In the spirit of *McFeely v. United States*, 700 F. Supp. at 418, and *Reed v. Ford Motor Co.*, 679 F. Supp. at 875, this defect should be resolved in favor of the summary judgment motion's opponent, but since the plaintiffs and Detrex each have moved for summary judgment, such a resolution provides little assistance.

Courts proceeding under the Federal Rules of Evidence have demonstrated a reluctance to allow experts determine questions of law. See, e.g., *Specht v. Jensen*, 853 F.2d 805, 809-10 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989) ("when the purpose of the testimony is to direct the jury's understanding of the legal standards which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case"); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) ("the line must be drawn between proper expert evidence as to facts, inferences to be drawn from those facts, and the opinions of the expert, on the one hand, and testimony as to the meaning and applicability of the appropriate law, on the other hand").

The Seventh Circuit has recognized, however, that in highly technical areas of law, the opinion of a properly qualified expert is admissible to determine whether a given course of conduct complied with the law. For example, in *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986), the court found no error in allowing an Internal Revenue Service agent to give an opinion as to the proper tax consequences of a particular action by a taxpayer, or in allowing the agent to offer an analysis of the taxpayer's action as a necessary precedent to the agent's evaluation of the tax consequences.

The *Windfelder* court cited with favor the Eleventh Circuit's decision in *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984), *cert. denied* 469 U.S. 1217 (1985). In *Gold*, the court found no error in allowing properly qualified witnesses to testify whether particular claims were eligible for reimbursement under Medicare, as long as the district court properly instructed the jury concerning the weight that should be given expert testimony.

The court cannot find that the NCP presents any less technical an issue than do the tax code and Medicare

regulations. Accordingly, pursuant to *Windfelder* and *Gold*, the court overrules the motion to strike the ATEC report. The excerpt of the Mundell deposition might require a different analysis in light of the absence of any basis for the opinion in the summary judgment record, *see Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989), but the admissibility of the ATEC report renders moot the motion to strike the cumulative Mundell opinion testimony.

Accordingly, the motion to strike the ATEC report is denied; the motion to strike the Mundell testimony is denied as moot.

IV. SUMMARY JUDGMENT: THE CERCLA CLAIMS

Both parties move for summary judgment on the issue of liability on count I; Detrex also seeks judgment on several other counts. Detrex contends that the claims in Counts I and II are barred because: the plaintiffs failed to comply with the National Contingency Plan ("NCP") provided in CERCLA; the plaintiffs actively contributed to contamination at the site; and Detrex's sale of a useful product did not constitute the "disposal of hazardous waste" within the meaning of CERCLA.

A. Responsible Party

Summary judgment may be granted as to liability in CERCLA cases where the plaintiff established the elements of a prima facie case and demonstrates that none of the statutory defenses applies. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *United States v. Mottolo*, 695 F.Supp. at 620, 631 (D.N.H. 1988). The plaintiffs submit that they have established the following elements necessary for a private party to recover costs under CERCLA:

(1) the defendant is a responsible party under CERCLA;

(2) a release or a threatened release of hazardous substances occurred;

(3) the plaintiffs incurred response costs; and

(4) the response costs were necessary and consistent with the NCP.

42 U.S.C. § 9607. The plaintiffs note that CERCLA imposes strict liability, and, therefore, the plaintiff need not establish negligence. *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 715 F.Supp. 949, 959 (W.D. Mo. 1989), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989); *Rodenbeck v. Marathon Petroleum Co.*, 742 F.Supp. 1448, 1455-56 (N.D. Ind. 1990).

As discussed above, the plaintiffs have presented undisputed evidence that releases of TCE occurred through delivery spills and the open-valve spill between 1978 and 1986, when Detrex was the plaintiffs' sole supplier of TCE. The summary judgment record provides an inescapable inference, opposable only through the sort of "metaphysical doubt" that will not preclude summary judgment, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 586, that drivers of Detrex or Detrex's contractor, Transport, were responsible for those spills.

Detrex argues that it was not a responsible party under CERCLA with respect to spills by Transport drivers. Count I seeks to hold Detrex liable under 42 U.S.C. § 9067(a)(1) as the "owner and operator of a . . . facility"; 42 U.S.C. § 9601(9) defines "facility" as including a motor vehicle. Count II seeks to hold Detrex liable under 42 U.S.C. § 9607(a)(3), which addresses

"any person who by contract . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9601(29) incorporates the definition of "disposal" from the Solid Waste Disposal Act, 42 U.S.C. § 6903(3), which includes "spilling, leaking, or placing of any sold [sic] waste or hazardous waste on any land so that such sold [sic] waste or hazardous waste or any constituent thereof may . . . [be] discharged into any waters, including groundwaters."

Detrex points to 42 U.S.C. § 9601(20)(B), which states,

> In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except at provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

Detrex argues that since Transport was acting as a common carrier when transporting TCE to EPC on fifteen occasions, Transport, and not Detrex, was the "owner and operator" with respect to any spills on those occasions.

The plaintiffs argue that Detrex has misread § 9601(20)(B), which simply limits the liability of common carriers to specified circumstances. The plaintiffs argue that a contrary reading would be at odds with the policies behind CERCLA, as evidenced by the statutory structure and legislative history. See 126 Cong. Rec. E4196 (daily ed., Sept. 4, 1980); S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980). They argue that the third-party defense of § 9607(b)(3) would be superfluous.

In a case brought under § 9607(a)(1), however, the third-party defense is available to owners and operators, and the plaintiffs have tendered no theory under which Detrex could be found to be an "owner and operator of a . . . facility" when Transport delivered TCE in Transport trucks. Detrex cannot be said to have owned the Transport trucks; Detrex cannot be said to have operated the Detrex trucks. Detrex is not a responsible party under § 9607(a)(1) with respect to the deliveries by Transport.

Undisputed evidence indicates that Detrex drivers spilled TCE during its deliveries, and that the "open valve" spill occurred during a Detrex delivery. Accordingly, analysis of Count I must continue.

Under Count II, however, Detrex's liability under arises from its contract or arrangement with the plaintiffs to transport the TCE. 42 U.S.C. § 9607(a)(3) makes no reference to "owner and operator"; accordingly, it is immaterial whether Transport or Detrex or both were "owner and operator" with respect to the TCE transported in Transport trucks.

B. Consistency with NCP

To recover the costs of response to the release of a hazardous substance, a private party must have incurred response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The NCP is the plan for removal of hazardous substances created by 42 U.S.C. § 9605; its requirements are set forth in 40 C.F.R. § 300. Proof that the response costs were consistent with the NCP is an element of a prima facie case for recovery under 42 U.S.C. § 9607. *County . . . Line Investment Co. v. Tinney*, 933 F.2d 1508, 1512 (10th Cir. 1991).

1. Public Comment

Under the 1985 version of the NCP in effect when this case was filed, one seeking recovery under 42 U.S.C.

§ 9607 had to prove strict compliance with the NCP. The less onerous 1990 version in effect today requires substantial compliance with the NCP.[4] *County Line Investment v. Tinney*, 933 F.2d at 1514-15. Detrex argues that the 1985 version governs this case, but that the plaintiffs cannot shown compliance under either standard. The plaintiffs argue that the 1990 version governs this case, but that they meet the requirements of both versions.

The plaintiffs cite the comments of the Environmental Protection Agency ("EPA") as support for the position that the EPA intended the "substantial compliance" standard of the 1990 version to apply retroactively. With regard to retroactivity, the EPA stated:

> Some commentators expressed the concern that PRPs [potentially responsible parties] may attempt to impose the new definition of "consistency with the NCP" on private cleanups that are already complete or underway. They assert that it should be made clear that the rule does not apply to private response actions initiated prior to the effective date of the revised NCP.
>
> In response, EPA does not believe that it is appropriate to grandfather cleanups that are already "underway." Such a position would result in an exemption from this rule for actions that were initiated prior to the effective date, but which may continue for years (such as long-term ground-water remediation actions). Further, EPA does not believe that this issue will pose a serious problem to private parties for several reasons. First, the rule's requirement of "substantial compliance" with potentially applicable NCP requirements affords private parties some

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[4] See 40 C.F.R. 300.430(c), (e); 40 C.F.R. § 300.700(c)(6) (1990) ("Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on substantially equivalent state and local requirements.").

> latitude in meeting the full set of revised NCP provisions. Second, private parties have been on notice for over a year that EPA intended to require compliance with the principal mandates of CERCLA—those required for a "CERCLA-quality cleanup," as discussed above—as a condition for being "consistent with the NCP." . . .
>
> Finally, the requirement for "consistency with the NCP" has been a precondition to cost recovery under CERCLA section 107 since the passage of the statute in 1980, and pursuant to the 1985 NCP, consistency with the NCP was measured by compliance with a detailed list of NCP requirements: thus, on-going actions should already comply with the 1985 provisions.

55 Fed. Reg. 8795 (1990).

Logic suggests that the plaintiffs' actions, taken between 1985 and 1990, should be governed by the 1985 NCP. It appears from the language quoted in the Federal Register that the EPA, whose views are entitled to substantial weight, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), intends for the private parties seeking response costs pursuant to CERCLA to meet the substantial compliance standard of the 1990 NCP. The court need not resolve the issue, however, because here, as in *County Line Investment Co. v. Tinney*, 933 F.2d 1508, the results are the same under either analysis.

Under 40 C.F.R. § 300.67 of the 1985 version of the NCP, remedial actions must be provided to the public for review and comment for a period of at least twenty-one days, and in most circumstances, public meetings are to be held during the public comment period.

Detrex argues that the plaintiffs allowed the populace no involvement in the choice of remedy. In *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*,

748 F. Supp. at 390, the court noted the importance of public knowledge and involvement in the selection of a remedial response, particularly in a dispute between private litigants, in which the public would be unrepresented by the State. In this case, however, the public was provided notice and an opportunity to review for thirty days the plaintiffs' application for a National Pollutant Discharge Elimination System ("NPDES") permit. The NPDES permit was to allow the plaintiffs to discharge that water which was extracted from the groundwater and treated to remove most of the TCE. No public hearing was held because the Indiana Department of Environmental Management did not consider the comments which were submitted as constituting significant public interest. The plaintiffs argue that this thirty day public comment period met the requirements of the NCP.

In *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269 (D. Del. 1987), *affirmed*, 851 F.2d 643 (3d Cir. 1988), the court considered an argument that the plaintiff's feasibility study, which was the subject of two public meetings and a public hearing, met the requirements of 40 C.F.R. § 300.67. The district court concluded, however, that the plaintiff's feasibility study did not meet the definition of "feasibility study" within the meaning of the NCP and, therefore, the court did not resolve the factual dispute over whether the proffered feasibility study was made available for public comment. "Public comment on a document that does not determine the nature and extent of a hazardous release or evaluate proposed remedies is not consistent with section 300.67(d)." 659 F. Supp. at 1297.

In this case, as in *Artesian Water*, the plaintiffs reasoned that the notice provided in the NPDES permit application satisfied the NCP public comment requirement. The information provided with the NPDES permit, however, does not appear to meet the requirements of the 1985 version of the NCP, because it does not set forth

feasibility studies that outline alternative remedial measures. 40 C.F.R. § 300.67(d) (1986). Further, the 1985 version of the NCP contemplates that a public meeting should be held in most circumstances. In this case, although some members of the public had sent comments to the Indiana Department of Environmental Management, it was determined that a public meeting was not necessary because there had not been significant public interest.

Nonetheless, public comment was received. Members of the general public submitted comments to IDEM, and IDEM responded to them in writing. The public's comments related to the need for a public hearing, the method of filtering and monitoring the groundwater, and acceptable levels of contamination. Even the 1985 NCP did not require public hearings in all cases.

2. RI/FS

Detrex argues that the plaintiffs did not "provide an opportunity for public comment concerning the selection of the response action," as required by the 1990 version, because they did not submit a proposed plan that supplements the Remedial Investigation/Feasibility Study ("RI/FS"), as required by 40 C.F.R. § 300.430(f)(2) (1990). Further, the plaintiffs did not submit a plan to the public for comment. 40 C.F.R. § 300.430(f)(3) (1990). Detrex notes that the purpose of the public comment period is to allow those most affected (nearby residents) to have a say in the type of remedial measures undertaken. Public notice of the NPDES permit was issued on March 9, 1988, but construction of the plaintiffs' choice of remedy, air stripping towers, was already under way in February 1988. Thus, Detrex argues, the public had no voice in the type of remedy.

The defendant in *General Electric Co. v. Litton Business Systems, Inc.*, 715 F. Supp. at 959, contended that

the plaintiff did not comply with NCP's criteria for removal or remedial actions. Among other things, the defendant argued that the plaintiff should have provided for public comment. The court agreed with the plaintiffs that a public hearing was not required because GE was complying with legally applicable or relevant and appropriate state requirements that the waste be removed, and the input of the state natural resources department served as a substitute for public comment. "Statutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives." 715 F. Supp. at 961. Detrex is correct *General Electric* is strictly on point because it concerned a removal action, while this case concerns a remedial action. Nonetheless, the admonition of liberal construction of statutes such as CERCLA applies with equal force to remedial actions under CERCLA.

In *County Line Investment Co. v. Tinney*, 933 F.2d at 1514, the Tenth Circuit noted that, "Both the 1985 and 1990 NCPs require, at a minimum, that a private party attempting to act 'consistent with the national contingency plan' provide an opportunity for public comment on its selection of the response action for the site." In *Tinney*, the plaintiffs did not involve the public in the selection of remedial measures, although they were in communication with state and federal officials and complied with state regulations regarding the closure of their landfill. In this case, however, public comment was invited in the notice of the application for the NPDES permit. Members of the public submitted comments, to which state officials responded. Further, had the state officials decided that there was significant public interest, a hearing on the NPDES application would have been held.

Therefore, the court concludes that the plaintiffs complied with the "public participation" requirements of both the 1985 and 1990 versions of the NCP.

Detrex also contends that the plaintiffs did not formulate and tender for public comment, a RI/FS pursuant to the 1985 NCP. Under the 1985 NCP, 40 C.F.R. § 300.68,[5] a RI/FS must be conducted before remedial action is taken pursuant to CERCLA in order to determine the nature and extent of the threat posed by the release of a hazardous substance and in order to evaluate proposed remedies.

In *Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, the court determined that a report known as "Water 2000" did not meet the criteria for a RI/FS set forth in the 1985 NCP. The report did not evaluate alternative remedies, and the affidavit of the administrator of the agency that drafted the Water 2000 report stated that water supply options and removal and remedial actions were never considered specifically from the standpoint of providing a replacement for contaminated groundwater. 659 F. Supp. at 1295. Therefore, the court concluded that the Water 2000 report was inconsistent with the NCP, holding that while another, redundant RI was unnecessary, "any document purporting to comply with the FS requirement must evaluate alternatives for remedying a release of hazardous substances, and this the Water 2000 report utterly fails to do." 659 F. Supp. at 1295-96. Detrex claims that in this case the plaintiffs conducted no study.

The plaintiffs offer Exhibit 1 to their motion partial summary judgment motion, the report by ATEC Associates, as proof that they complied with the NCP. The ATEC report refers to documents upon which ATEC relied in forming its opinion as to compliance with the NCP. The reference to those documents indicates that the plaintiffs engaged in an investigation of the contamination and possible remedies. Detrex challenges the legal

[5] Both parties analyzed the plaintiffs' compliance with the RI/FS requirements under the 1985 version of the NCP.

sufficiency of the ATEC report, but offers no opposing evidence. As noted above, the ATEC report is not legally insufficient. It stands as undisputed evidence that the plaintiffs complied with the RI/FS requirement of the NCP.

C. Clean Hands Defense

Detrex argues that the plaintiffs cannot recover response costs pursuant to CERCLA because EPC actively contributed to contamination at the manufacturing site. Detrex submits evidence that EPC employees saw TCE waste oil, known as "stillbottoms", on the ground in the waste storage area, that a forklift driven by an EPC employee punctured a drum containing TCE, that TCE dripped from the hand degreaser onto the floor, that many years ago EPC employees washed their tools and the floor with TCE, and that various accidents caused TCE spills. Detrex claims that Congress did not intend for parties that pollute to recover response costs. Detrex cites several cases which, it claims, implicitly support this conclusion. However, the court agrees with the plaintiffs that the cases Detrex cites do not support the conclusion that a party that has been responsible for groundwater contamination cannot recover response costs from another party that is responsible for contamination.

In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d at 1418, the defendant claimed that the plaintiff could not recover under CERCLA because the plaintiff was motivated by the desire to avoid liability rather than the desire to respond to hazardous substance pollution. The Tenth Circuit rejected the notion that unclean hands is a defense to CERCLA liability. The court noted that CERCLA is a strict liability statute, subject only to the defenses that the release was caused by an act of God, an act of war, or the unforeseeable acts of a third party not in a contractual relationship with the defendant, who was exercising due care with respect to the hazardous substance. *See also Smith Land & Improve-*

ment Corp. v. Celotex Corp., 851 F.2d 86, 90 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *United States v. Kramer*, 757 F. Supp. 397, 428 (D.N.J. 1991).

In *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1119 (N.D. Ill. 1988), the district court discussed expressed Congressional intent to allow wrongdoers to recover against their compatriots, and noted that an "unclean hands" defense would undermine the policies on which CERCLA is based, because willing contributors would postpone cleanup until all agreed to participate. 691 F. Supp. at 1119. This court agrees with the *Allied* court that applying the unclean hands doctrine against a CERCLA plaintiff who may have caused the release of hazardous substances would defeat CERCLA's purpose. The plaintiffs' possible contribution to groundwater contamination does not bar their CERCLA claims.

D. Disposal

Count II alleges that Detrex arranged for the disposal of TCE. Detrex argues that it is not liable because its sale of TCE, a useful manufacturing chemical, was not a disposal under 42 U.S.C. § 9607(a)(3). Detrex relies on *Prudential Insurance Co. of America v. United States Gypsum*, 711 F. Supp. 1244, 1254-1255 (D.N.J. 1989), which held that since there was no affirmative act to get rid of asbestos except by sale for use as part of a complete, useful product, there was no disposal, notwithstanding that the asbestos eventually began to pose a health risk by flaking off. The transfer was not tantamount to a disposal. *See also Edward Hines Lumber Co. v. Vulcan Materials Corp.*, 685 F. Supp. 651, *affirmed*, 861 F.2d 155 (7th Cir. 1988).

The plaintiffs respond with the definition of "disposal" found in the Solid Waste Disposal Act, 42 U.S.C. § 6903(3):

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

CERCLA incorporates this definition of disposal. 42 U.S.C. § 9601(29). The plaintiffs also note that *Prudential Insurance* involved a claim for compensation for the removal of asbestos, and the court found that CERCLA did not apply to asbestos-containing products that were useful when sold and used as intended. The TCE at issue here, however, was not useful after it was spilled on the ground. If the TCE was spilled when it was delivered, it was not used as intended by the parties.

In *Edward Hines Lumber Co. v. Vulcan Materials Corp.*, 685 F. Supp. 651, the court found that liability did not attach to an innocent supplier of a hazardous substance who made no decision to dispose of the hazardous substance. The plaintiffs argue that Detrex made decisions as to delivery, and that their spills during delivery constitute disposals.

The court agrees with the plaintiffs. Although the plaintiffs selected the site of delivery, Detrex selected the method of delivery and the safeguards that would surround the deliveries. The plaintiffs had no say in whether the Detrex driver would close the valve on the day of the "open valve" spill.

E. Conclusion

Based on the foregoing, the court concludes that the defendants are entitled to judgment as a matter of law on Count I insofar as Count I relies on the alleged overflow spill or delivery spills by Transport drivers. Judgment on the overflow spill claim is appropriate because the summary judgment record contains no evidence that

Detrex caused an overflow spill. Judgment on the delivery spills is appropriate because there is no showing that Detrex was an "owner and operator" on those occasions.

Insofar as Count I is based on the open-valve spill and delivery spills during deliveries by Detrex drivers, however, the plaintiffs have demonstrated their entitlement to judgment as a matter of law on the issue of liability. Undisputed evidence demonstrates that Detrex owned and operated the trucks, and hence was a responsible party. Undisputed evidence indicates that Detrex caused a release of a hazardous substance on those occasions. Undisputed evidence (the ATEC report) indicates that the plaintiffs incurred response costs that were necessary and consistent with either potentially applicable version of the NCP.

Insofar as Count II is concerned, the defendants are entitled to judgment as a matter of law insofar as that count is based on the alleged overfill spill. The defendants are not entitled to judgment as a matter of law on the remaining issue in Count II, and the plaintiffs have not sought summary judgment on Count II.

V. STATE LAW CLAIMS

The remaining counts of the complaint at issue in this motion are based on common law. The parties agree that Indiana law applies.

A. Breach of Contract; Notice

Count IV of the complaint alleges that an implied term existed in the contract between the plaintiffs and Detrex that required Detrex to deliver TCE without spillage and without causing environmental damage. The plaintiffs allege that Detrex breached this implied term. Detrex seeks summary judgment, arguing that the parties' trans-

action was a sale of goods, governed by the Uniform Commercial Code. Under IND. CODE 26-1-2-607 (3)(a), for a buyer to recover for a seller's breach, "The buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." Detrex contends that the plaintiffs did not give Detrex timely and sufficient notice of its breach to entitle them to a remedy.

Detrex notes that though spills allegedly occurred in the early 1980's, the plaintiffs waited until 1986 to "voice their displeasure" in an August 27, 1986 letter notifying Detrex that EPC had a claim against Detrex arising out of spillage at the EPC plant. The letter informed Detrex that Miles Laboratories had asserted that EPC is liable for sewer charges Miles had incurred in disposing of contaminated water. The letter also informed Detrex that an investigation revealed that TCE had migrated from EPC to Miles' property. Detrex states that this letter is the only formal notice it received.

Detrex argues that a seller has a right to rely upon a transaction's finality after an elapse of time, citing *Courtesy Enterprises, Inc. v. Richards Laboratories*, 457 N.E.2d 572, 577 (Ind. App. 1983). The *Courtesy Enterprises* court stated that if "the buyer knew of the existence of alleged defects within a reasonable period of time and did not notify the seller of his dissatisfaction for some time after that, his actions would not be those of a reasonable merchant concerned with saving the transaction and with avoiding litigation." 457 N.E.2d at 577.

Detrex is correct that timely notice of a seller's breach "is a substantive condition precedent to recovery" and a "buyer's failure to provide timely notice waives its right to assert any breach." *McClure Oil Corp. v. Murray Equipment, Inc.*, 515 N.E.2d 546, 554 (Ind. App. 1987). The plaintiffs, however, argue that no particular form of notice is required, and submit that EPC gave Detrex

notice of an overfill spill in 1980. They note the telephone call in which Mr. Copenhaver of EPC told Mr. Miles of Detrex that there had been a spill. As noted above, however, (*see* Part III-A *supra*), the summary judgment record does not establish the overfill spill's occurrence. Notice of an alleged event on which suit cannot be based cannot satisfy the requirement in IND. CODE 26-1-2-607(3)(a) of timely notice with respect to the other, actionable breaches.

The plaintiffs also argue that their 1986 letter was timely because the time for notification begins to run when the buyer knew or should have known of the breach. They argue that the reasonableness of any delay in notifying the seller of a breach depends on the nature of the breach, the type of purchaser, and the possible prejudice to the seller. If the breach is a latent one, the reasonable time for giving notice begins to run when the breach should have been discoverable. The plaintiffs did not learn of the TCE contamination in the soil and groundwater until March, 1986.

The evidence upon which the plaintiffs rely to establish the occurrence of the delivery spills and open-valve spills defeat this argument. The breach alleged in Count IV consists of spills, not groundwater contamination. The plaintiffs knew of those spills when they occurred, but did not notify Detrex until years later. Detrex is entitled to judgment as a matter of law on Count IV.

B. Trespass

Count V asserts that Detrex committed a trespass when it spilled TCE at the site. Detrex claims that the plaintiffs cannot meet their burden of proving the essential elements of trespass under Indiana law, which are: (1) that the plaintiff was in possession of the land; and (2) that the defendant entered the land without right. *Sigsbee v. Swathwood,* 419 N.E.2d 789, 799 (Ind. App.

1981). Detrex argues that because it had permission to enter the EPC premises to make deliveries, it cannot be liable for trespass. *See Bennett v. McIntire,* 121 Ind. 231, 23 N.E. 78 (1889); *City of Bloomington v. Westinghouse Electric Corp.,* 891 F.2d 611, 615 (7th Cir. 1989).

The plaintiffs claim that although Deterex initially had permission to enter the EPC site, it exceeded the scope of its permission and became a trespasser when it spilled TCE. They cite *Indiana & Michigan Electric Co. v. Stevenson,* 173 Ind. App. 329, 363 N.E.2d 1254 (1977), in which property owners claimed that a public utility committed a trespass and an unconstitutional taking when it which entered their land with permission to conduct a survey and cut growing crops to complete its task. The court determined that the utility company had no right to destroy the crops. 363 N.E.2d at 1259-60. The court employed a Fifth Amendment analysis, however, and did not explicitly state that the defendants' action amounted to a common law trespass.

Detrex cites several Indian cases for the proposition that a party entering upon the land of another with permission does not become a trespasser even if the party abuses the privilege. *See Bennet v. McIntire*, 121 Ind. 231, 23 N.E. 78 (1889). In *Spades v. Murray*, 2 Ind. App. 401, 405, 28 N.E. 709, 710 (1891), the Court of Appeals stated that where a party enters with authority and then exceeds or abuses its authority, no trespass has been committed, and relief must be found under another remedy. *See also* Restatement (Second) of Torts § 214.

The case law convinces the court that the plaintiffs have no state law trespass remedy against Detrex. There is no dispute that Detrex drivers had permission to enter the EPC site. The claim that Detrex negligently and recklessly spilled TCE while at the site does not make Detrex or its drivers trespassers. Therefore, Detrex is entitled to summary judgment as to Count V.

C. Drivers' Negligence

In Count VI, the plaintiffs allege that the drivers who delivered TCE were negligent. Detrex claims that this count must fail because the plaintiffs present no evidence respecting the applicable standard of care for truck drivers delivering chemicals in the 1980s and 1980s. Detrex contends that expert testimony is required to establish the standard of care for handling TCE. Detrex cites *Ellis v. Smith*, 528 N.E.2d 826, 828 (Ind. App. 1988), a medical malpractice action in which the plaintiff claimed that he did not give informed consent for an operation. The court stated that, "The general rule is that expert medical opinion testimony is required to establish the content of reasonable disclosure unless the situation is clearly within the realm of laymen's comprehension, as where disclosure is so obvious that laymen could recognize the necessity of such disclosure."

The plaintiffs offer several cases in which the courts have stated that in negligence actions there is one standard of care—that of a reasonable person under the circumstances. *See Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 713 (1953); *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675, 678 (Ind. App. 1981); *P-M Gas & Wash Co., Inc. v. Smith*, 178 Ind. App. 457, 383 N.E.2d 357 (1978). The court agrees with the plaintiffs' argument that the reasonable handling of TCE is not beyond the ken of the ordinary layperson. Although the ordinary person is not familiar with the chemical properties of TCE, the ordinary person can understand that TCE is a hazardous substance which should be handled in such a way that it is not released into the environment. Therefore, unlike the situation in medical malpractice cases, in this case, expert testimony on the reasonable standard of care is not a necessary element in the plaintiffs' prima facie case.

The plaintiffs also argue that Detrex's conduct constitutes negligence *per se because* Detrex violated a legal

duty to report and clean up its TCE spills, as set forth in IND. ADMIN. CODE tit. 330.1, r. 1-6-2 (1974). The violation of a statute intended to protect the class of persons in which the plaintiff is included and intended to prevent the type of harm which has occurred as a result of the violation of statute is negligence *per se*. *Rubin v. Johnson*, 550 N.E.2d 324, 329 (Ind. App. 1990). Although violation of a statute may be negligence *per se*, however, violation of an administrative regulation is only evidence of negligence under Indiana law. *Hodge v. NorCen. Inc.*, 527 N.E.2d 1157, 1160, n.3 (Ind. App. 1988). Therefore, the court cannot conclude that Detrex's failure to report, contain, and clean up the TCE spill in violation of an Indian regulation is negligence *per se*.

The plaintiffs also cite 42 U.S.C. § 9603(a), which imposes a duty upon a person in charge of a facility to notify the National Response Center "as soon as [the person] has knowledge of any release . . . of a hazardous substance from such . . . facility in quantities equal to or greater than those determined pursuant to section 9602 . . . ." However, the plaintiffs have not established that Detrex had any knowledge of a release of a certain quantity of TCE.

Although the court does not accept the plaintiffs' theory that negligence per se applies to this case, the court declines to grant summary judgment in Detrex's favor as to Count VI.

D. Negligent Hiring

Detrex claims that summary judgment should be granted in its favor as to Count VII, which alleges that Detrex negligently hired and trained its delivery drivers. Detrex claims that to prevail on this count, the plaintiffs would have to prove that Detrex negligently hired and trained each of the five drivers who delivered TCE to EPC, apparently because it has not been established which driver or drivers spilled TCE during delivery.

Detrex notes that no evidence established that any of the drivers had a poor driving record or that any of the drivers had a physical or mental handicap or a criminal disposition. The record before the court does not show that any of the drivers had been fired from a previous job, although Detrex fired one of the drivers because of his inability to handle the truck.

Indiana recognizes a cause of action based on negligent hiring, *Tindall v. Enderle*, 162 Ind. App. 524, 320 N.E.2d 764 (1974), but the negligent hiring theory applies only to special situations, and is not applicable when the employer stipulates that the employee was acting within the scope of his or her employment. *Tindall*, 320 N.E.2d at 767-68; *Lange v. B. & P. Motor Express, Inc.*, 257 F. Supp. 319 (N.D. Ind. 1966). In such cases, "the doctrine of *respondeat superior* provides the proper vehicle for a direct action aimed at recovering the damages resulting from a specific act of negligence committed by an employee within the scope of his employment." *Tindall*, 320 N.E.2d at 768.

The plaintiffs contend that the two drivers who were deposed admitted that they had spilled TCE in deliveries at other places. The deposition testimony indicates that one driver, Dennis Butler, was present at a TCE spill, but does not state that these drivers caused spills. Further, the plaintiffs contend that the drivers' training was "minimal". No such conclusion may be reached without reference to standard practice in training drivers of hazardous substances. The two drivers' depositions indicate that they received literature informing them of the nature of TCE and they were instructed in how to handle it. Therefore, the court agrees with Detrex that summary judgment should be granted as to the claim in Count VII that Detrex negligently hired and trained its drivers.

The plaintiffs also argue that the doctrine of *res ipsa loquitur* applies to this case. Under this doctrine, an inference of negligence is created by a showing that (1)

the injuring instrumentality was under the exclusive management and control of the defendant or his servants and (2) in the ordinary course of things, such an accident does not occur if those with management and control use proper care; such a showing shifts a burden of production to the defendant. *Hammond v. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind. App. 1982).

The plaintiffs have not produced evidence to show that the instrumentality which caused TCE contamination was within Detrex's exclusive control. As the parties have agreed, Detrex used an independent carrier to make several of the TCE deliveries. Therefore, even if the spills occurred because of Transport's negligence and Detrex is liable under CERCLA for Transport's negligence, the evidence does not show that Detrex has exclusive control over Transport. Therefore, the court disagrees with the plaintiffs' argument that *res ipsa loquitur* applies.

The defendants are entitled to judgment as a matter of law on Count VII of the complaint.

E. Abnormally Dangerous Activity

Detrex claims entitlement to summary judgment on the plaintiffs' claim that Detrex is strictly liable for damages because its delivery of TCE constituted an "abnormally dangerous activity."[6] Under Indiana law, a party who carries on an abnormally dangerous activity is strictly liable for the harm resulting from the activity even though that party may have exercised the utmost care to prevent the harm. *Bridges v. Kentucky Stone Co.*, 425 N.E.2d 125 (Ind. 1981); Restatement (Second) of Torts § 519 (1977). The factors considered in determining whether an activity is abnormally dangerous are:

> (a) existence of a high degree of risk of some harm to the person, land or chattel of others;

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[6] The plaintiffs claimed in Count VIII that Detrex was engaged in an "ultrahazardous activity". However, the parties now agree that the modern term is "abnormally dangerous activity".

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous activities.

Restatement (Second) of Torts § 520 (1977). The inquiry is not on the hazardous substance's dangerous propensities, but on the defendant's activity with regard to the substance. *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990); *Erbrich Products Co., Inc. v. Wills*, 509 N.E.2d 850, 857 (Ind. App. 1987). The activity at issue here is Detrex's transportation of TCE.

The Restatement's first and second factors favor the plaintiffs. The handling of TCE involves a high degree of risk to persons and land, and it is likely that the harm that results from the release of TCE would be great. The third factor, however, favors Detrex: it appears from the Detrex drivers' descriptions of their techniques that the exercise of reasonable care can eliminate the risk of TCE release.

In *Smith v. Kauffman*, 174 Ind. App. 222, 366 N.E.2d 1195, 1199 (1977), a wrongful death action resulting from a gasoline explosion, the court rejected the plaintiff's proposed jury instruction that the refueling of a crane was an extra-hazardous activity. The Court of Appeals affirmed, stating that "where the doing of a task is safe when properly executed it is not intrinsically dangerous and absolute liability does not attach. . . . Since the filling of a gasoline tank is not an extra-hazardous

activity in and of itself the giving of appellant's Instruction No. 7 would have drawn upon an incorrect theory of the law." Similarly, in this case, the pumping of a dangerous fuel, when properly done, is not so intrinsically dangerous that absolute liability must attach.

The fourth factor also favors Detrex: although TCE is not a common household fuel, it is an industrial solvent, and pumping it from one tank into another is not unusual.

Finally, the fifth and sixth factors support Detrex. EPC found TCE to be a very useful solvent and used it for many years. *See City of Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 615-16 (7th Cir. 1989). EPC also had it delivered to its storage tanks and drew it from the tanks to use it. Therefore, EPC determined where the activity of delivering TCE would be conducted. EPC cannot claim that the value of delivery TCE is outweighed by its danger to the community. The plaintiffs note that the locality of Elkhart's drinking water must be taken into account, but EPC determined where to locate its plant and directed its suppliers to deliver solvents there.

For these reasons, summary judgment must be granted in Detrex's favor on Count VIII.

F. Conceded Claims

Detrex also sought summary judgment as to the nuisance claim in Count IX and the indemnity claim in Count XIII. The plaintiffs withdrew their nuisance and indemnity claims, and the court therefore grants summary judgment on Counts IX and XIII.

G. Punitive Damages

Detrex claims that the plaintiffs are not entitled to punitive damages. As Detrex notes, Indiana requires plaintiffs to establish "by clear and convincing evidence, all of the facts that are relied upon . . . to support . . . recovery of punitive damages." IND. CODE 34-4-34-1;

Orkin Exterminating Co., Inc. v. Traina, 486 N.E.2d 1019, 1022 (Ind. 1986) (punitive damages are penal in nature and therefore require a higher standard of proof than the preponderance of the evidence standard). The plaintiff must show by clear and convincing evidence "that the defendant acted with malice, fraud, gross negligence, or oppression which was not the result of mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other human failing." *Lazarus Dept. Store v. Sutherlin,* 544 N.E.2d 513, 527 (Ind. App. 1989). Detrex submits that the plaintiffs cannot show such evidence.

The plaintiffs claim that the issue of punitive damages is unsuited for disposition by summary judgment, citing *Spangler v. Sears, Roebuck & Co.,* 752 F. Supp. 1437, 1447 (S.D. Ind. 1990) ("because punitive damage issues are typically matters of 'degree' they are uniquely unsuited for disposition by pretrial motion."). The plaintiffs also cite *Werlein v. United States,* 746 F. Supp. 887, 907 (D. Minn. 1990), in which the court states that, "Summary judgment is available in punitive damages cases. The standard for obtaining summary judgment, however, is an onerous one, and a summary judgment disposing of such claims will rarely be granted.' " (quoting Alsop and Harr, *Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective,* 11 Wm. Mitchell L. Rev. 319, 326-27 (1985)).

Citing *Reed v. Ford Motor Co.,* 679 F. Supp. 873, 878 (S.D. Ind. 1988), the plaintiffs further argue that the court cannot stand in the shoes of the trier of fact when making a determination of a summary judgment motion. *Reed* recognized that the court "at the summary judgment stage will . . . not have the benefit of all the evidence the jurors will actually hear in the context they will hear it. . . . the court cannot make value judgments that could arise over what constitutes iniquitous . . . conduct." 679 F. Supp. at 877. However, the *Reed* court also recognized that "this question is not always within the sole province

of the jury, because there is certain conduct, such as that described in *Orkin* [*Exterminating Co., Inc. v.–Traina*], 486 N.E.2d 1019, 1024 (Ind. 1986)], which cannot reasonably be said to constitute more than mere negligence." 679 F.Supp. at 877, n.3. In *Orkin*, the court found as a matter of law that the evidence was insufficient to support an award of punitive damages. 486 N.E.2d at 1024.

The plaintiffs have presented evidence that there were numerous spills of TCE upon delivery during the time that Detrex was EPC's sole supplier of TCE. This, the plaintiffs argue, is evidence of Detrex's obdurate conduct, which would support an award of punitive damages. The court cannot conclude at this stage that there is no evidence from which reasonable jurors could find, by a clear and convincing standard, that punitive damages should be awarded. *See Spearman v. Delco Remy Div. of General Motors Corp.*, 717 F. Supp. 1351, 1361 (S.D. Ind. 1989). Therefore, the court declines to grant summary judgment as to the plaintiffs' claim for punitive damages.

VI. ORDER

For the foregoing reasons, the court hereby:

A. GRANTS IN PART and DENIES IN PART Detrex's first motion to strike, as set forth in Parts III-A and III-C of this memorandum.

B. DENIES Detrex's second motion to strike.

C. GRANTS IN PART the plaintiffs' motion for partial summary judgment. The plaintiffs are granted judgment as a matter of law on the issue of Detrex's liabilty on Count I of the complaint insofar as Count I is based on the "open-valve spill" and "delivery spills" during deliveries by Detrex drivers. The plaintiffs' motion for partial summary judgment on Count I is denied in all other respects.

D. GRANTS IN PART the defendant's motion for summary judgment. The motion is granted, and Detrex is entitled to judgment as a matter of law, with respect to the following:

1. As to Count I, insofar as Count I relies on the alleged overflow spill or delivery spills by Transport drivers;

2. As to Count II, insofar as Count II is based on the alleged overfill spill;

3. As to Count IV;

4. As to Count V;

5. As to Count VII;

6. As to Count VIII;

7. As to County IX; and

8. As to Count XIII.

E. Detrex's motion for summary judgment is DENIED in all other respects.

SO ORDERED.

ENTERED: November 18, 1991

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

APPENDIX D

THE STATUTORY PROVISIONS INVOLVED

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

42 U.S.C.A. §§ 9601 through 9675

§ 9601(9):

> [t]he term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

* * * * *

§ 9607(a):

> [n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any

other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

§ 9613(f)(1):

[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be

brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.